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Supreme Court, U.S.
FILED

05-218 AUG 11 2005

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No. _____

In the Supreme Court of the United States

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Petitioner,

v.

TONY RAY COLEMAN,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court should resolve the circuit split concerning whether *Vitek v. Jones*, 445 U.S. 480 (1980), "clearly established" that an unadjudicated sex offender—a person whom state prison officials have reason to believe committed crimes of a sexual nature, but was not convicted thereof—has a liberty interest in not having his release on parole conditioned upon his participation in confidential sex-offender therapy.

2. Whether the Court should resolve the circuit split concerning whether a state prisoner's claim that his parole was revoked for his failure to abide by allegedly unconstitutional conditions of parole must be brought exclusively under the federal civil rights statute, 42 U.S.C. §1983, or instead may be brought under the federal habeas corpus statute, 28 U.S.C. §2254.

LIST OF PARTIES

Petitioner is Doug Dretke, Director of the Texas Department of Criminal Justice, Correctional Institutions Division.

Respondent is Tony Ray Coleman, a prisoner currently in the custody of the Texas Department of Criminal Justice.

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PETITION FOR WRIT OF CERTIORARI

By expanding *Vitek v. Jones*, 445 U.S. 480 (1980), to dictate that unadjudicated sex offenders must receive a hearing before they may be required to attend sex-offender therapy as a condition of parole, a panel of the Fifth Circuit "has extended liberty interest protection to . . . sex offenders without Supreme Court imprimatur." *Coleman v. Dretke*, 409 F.3d 665, 670 (CA5 May 13, 2005) (Jones, J., dissenting from denial of reh'g en banc, joined by Jolly, Smith, Barksdale, Garza, DeMoss, and Clement, JJ.); Pet. App., at 24. The panel decision creates a split with the Ninth and Tenth Circuits over whether "clearly established" federal law recognizes any such liberty interest. Moreover, this case presents a circuit split as to whether a prisoner challenging allegedly unconstitutional conditions of parole must sue under 42 U.S.C. §1983, or may instead seek relief under the federal habeas statute, 28 U.S.C. §2254. The Court should grant the petition for a writ of certiorari to address these important and previously unaddressed issues of federal law.

OPINIONS BELOW

The Fifth Circuit panel opinion is reported as *Coleman v. Dretke*, 395 F.3d 216 (CA5 Dec. 21, 2004); App., at 1-15. The same panel subsequently issued a per curiam opinion on the TDCJ's motion for rehearing en banc. 409 F.3d 665 (CA5 May 13, 2005) (per curiam); App., at 16-33. Judge Edith Jones, joined by Judges Jolly, Smith, Barksdale, Garza, DeMoss, and Clement, dissented from the denial of rehearing en banc. *Id.*, at 670 (Jones, J., dissenting from denial of reh'g en banc); App., at 23-33. The order and final judgment of the federal district court adopting the federal magistrate's report and denying Coleman's habeas petition are unreported; App., at 34-35, 36-37, 38-44. The decisions of Texas Court of Criminal Appeals and the Travis County District Court denying Coleman's state petition for habeas relief are also unreported; App., at 45, 46-47.

JURISDICTION

A panel of the Fifth Circuit issued its decision on December 21, 2004, and the Fifth Circuit denied the TDCJ's motion for rehearing en banc on May 13, 2005. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend XIV, §1.

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1).

"Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." 42 U.S.C. §1983.

STATEMENT OF THE CASE

On February 11, 1986, Tony Ray Coleman was convicted, as a habitual offender, of burglary of a habitation and sentenced to thirty years in Texas prison. R.2. He was released on parole by the Texas Board of Pardons and Paroles ("Board") in 1991. R.71. While on parole, Coleman was indicted in 1992 for the aggravated sexual assault of a twelve-year-old girl with mental disabilities. R.72, 282. In 1993, prior to the disposition of the aggravated sexual-assault charge, the Board revoked Coleman's parole, and he returned to prison. R.117. Later that year, Coleman pleaded guilty to assault based on the same incident that had resulted in his indictment for aggravated sexual assault. R.75.[1] He was not, however, convicted of any crime that constitutes a sex offense under Texas law.

In January 2001, Coleman was released to mandatory supervision.[2] R.80-81. Shortly thereafter, the Board imposed

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1. The State elected not to try Coleman for sexual assault after DNA testing proved inconclusive. R.31. As part of the plea agreement, the prosecutor dropped most of the charges in the indictment. R.76.

2. Under Texas law, mandatory supervision is "the release of an eligible inmate . . . so that the inmate may serve the remainder of the inmate's sentence not on parole but under the supervision of the pardons and paroles division." TEX. GOV'T CODE §508.001(5). For most types of offenders, an inmate must be released on mandatory supervision when his calendar time plus good-conduct time equals the maximum term to which he was sentenced. *Id.* §508.147(a). By contrast, parole release is

special condition "M," which required Coleman to register as a sex offender. R.84-85. It also imposed special condition "X," which required Coleman to participate in the Board's sex-offender treatment program by enrolling and participating in sex-offender treatment as directed by the supervising parole officer. R.89-90. Coleman complied with special condition "M," registering as a sex offender on April 25, 2001. R.93. However, the Board voluntarily removed the condition in October 2004.[3] As a result, Coleman is no longer registered as—and is under no obligation to be registered as—a sex offender. 409 F.3d, at 671 n.3 (Jones, J., dissenting from denial of reh'g en banc); App., at 26.[4]

On April 3, 2001, Coleman's parole officer referred him to a sex-offender therapist. R.92. Coleman attended his initial intake session on April 4, but he failed to return for a follow-up

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discretionary. *Id.* §508.141. Once released, a person on mandatory supervision is considered to be on parole. *Id.* §508.147(b). Because the two types of release result in similar treatment, the panel used the term "parole" to describe Coleman's release on mandatory supervision. *Coleman v. Dretke*, 395 F.3d 216, 219 n.1 (CA5 2004); App., at 2. For simplicity, the State herein adopts the panel's use of the term "parole" to include Coleman's release on mandatory supervision.

3. As a policy matter, the Board has determined not to impose Special Condition "M" registration on parolees lacking a qualifying conviction specifically listed in the Texas Sex Offender Registration Act ("SORA"), TEX. CODE CRIM. PROC. art. 62.02(a). *See Williams v. Ballard*, 2004 WL 1499457, at *9 (N.D. Tex. June 18, 2004) (unpublished). Consistent with that policy, Coleman's name was removed from the registry, and he is not currently listed as a sex offender.

4. In response to the en banc dissent, the panel acknowledged "the state's decision to remove Coleman from its sex offender registry." 409 F.3d, at 668; App., at 19-20. It also recognized that Coleman's parole was revoked solely because he failed to submit to sex-offender therapy, not because of any registration requirement. *See id.*, at 666.

appointment on April 11, as instructed. R.94-95. Coleman's parole officer referred him to a second therapist, with whom Coleman was scheduled to meet on May 14, 2001. He again failed to attend. R.96-98. At Coleman's revocation hearing, the hearing officer found that Coleman had failed to enroll and participate in sex-offender therapy, R.109, and therefore recommended revocation of Coleman's supervised release. R.111. Subsequently, a Board panel revoked Coleman's supervised release. Coleman—who was then in Travis County jail as a result of his arrest for an unrelated theft offense in May—was later transferred back to state prison.[5]

Coleman filed a state application for writ of habeas corpus, which was denied without written order in May 2002. *Ex parte Coleman*, Appl. No. 52,281-01 (Tex. Crim. App. May 29, 2002). In September 2002, Coleman filed his federal petition for a writ of habeas corpus. R.1. Coleman alleged that he was denied a hearing to challenge the imposition of the sex-offender therapy as a condition of parole. R.7. The relief he sought included (1) release on mandatory supervision; (2) a court order "free[ing] Petitioner from his unconstitutional confinement"; and (3) restoration of good-time credits lost due to his revoked parole. R.16.

After the federal district court rendered a final judgment denying the writ, R.294-96, Coleman appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit had jurisdiction of

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5. Subsequent to his revocation, Coleman pleaded guilty on January 11, 2002, to the theft offense he committed on May 17, 2001, and he received a five-year sentence. If parole is denied on that sentence, Coleman will discharge the theft offense in May 2006 and will then be eligible for mandatory-supervision release on his prior offenses. Due to his prior conviction for burglary of a habitation, Coleman is not eligible for mandatory-supervision release on the theft offense. It was because of this ineligibility due to other crimes that the issuance of the mandate did not immediately result in Coleman's re-release on mandatory supervision.

Coleman's appeal under 28 U.S.C. §1291. *See* SUP. CT. R. 14.1(g)(ii). On December 21, 2004, a three-judge panel reversed the district court's decision and remanded for a conditional grant of habeas relief. *Coleman v. Dretke*, 395 F.3d 216 (CA5 Dec. 21, 2004); App., at 1-15. The Fifth Circuit denied the State's petition for rehearing en banc by an 8-7 vote, and the panel issued an additional opinion on rehearing. 409 F.3d 665 (CA5 May 13, 2005) (per curiam); App., at 16-33. The seven judges who voted for rehearing en banc joined an opinion dissenting from its denial. *Id.*, at 670 (Jones, J., dissenting from denial of reh'g en banc, joined by Jolly, Smith, Barksdale, Garza, DeMoss, and Clement, JJ.).

SUMMARY OF THE ARGUMENT

Through a significant misinterpretation of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §2254, the Fifth Circuit's panel decision grants to unadjudicated sex offenders a new liberty interest never previously recognized by this Court: the right to avoid sex-offender therapy as a condition of parole. The panel's conclusion that *Vitek* "clearly established" such a liberty interest for habeas purposes conflicts with decisions of the Tenth and Ninth Circuits holding that *Vitek* did *not* "clearly establish" the same liberty interest in the context of damages claims under 42 U.S.C. §1983. *See Chambers v. Colo. Dep't of Corr.*, 205 F.3d 1237, 1244 (CA10 2000); *Neal v. Shimoda*, 131 F.3d 818, 832 (CA9 1997). The divided judicial views on this subject—both within the Fifth Circuit and with other federal courts of appeals—reveal a need for this Court's guidance.

More broadly, the panel's creation of a novel liberty interest disregards the AEDPA's plain terms and subverts Congress's intent to restrict federal courts' review of state-court judgments. Under the AEDPA, a federal court may provide habeas relief from a state-court decision that is "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). The panel ignored the AEDPA's restrictive

lens in holding that *Vitek* provided Coleman a liberty interest in avoiding sex-offender treatment, and that the Texas state courts' decisions denying relief were contrary to *Vitek*. *Vitek* held that prisoners have a liberty interest in avoiding (1) the stigma of being labeled mentally ill and transferred from prison, and (2) the imposition of mandatory behavior-modification treatment. *Vitek* did not involve conditions of parole or sex-offender treatment programs that are confidential under state law.

The panel's extension of *Vitek* hinged on its assumptions that Coleman's treatment would involve intrusive, behavior-modifying techniques; that treatment would not in fact be confidential; and that requiring Coleman to attend sex-offender therapy as a condition of parole would therefore stigmatize him. But Coleman neither alleged nor proved in the Texas courts any of these "facts" undergirding the panel's analysis. Thus, the panel's conclusion that the state courts' denial of relief contravened *Vitek* was based on allegations that were never presented to the state courts, are not part of the appellate record, and were never proven in *any* court. By failing to evaluate the Texas courts' review of Coleman's claims *on the facts Coleman presented therein*, the panel decision undermines the AEDPA's twin goals of comity and federalism.

This case does not involve sex-offender registration, but rather the less intrusive parole condition of confidential sex-offender "talk therapy" treatment. Significantly, only two years ago, the Court declined to decide whether a state law requiring public *registration* of sex offenders without affording a hearing to determine individual dangerousness violates substantive due process. *See Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003). And even more recently, the Court rejected the claim that a state law broadly requiring registration of convicted sex-offenders, with no provision for a hearing to establish individual dangerousness, is unconstitutional. *See Smith v. Doe*, 538 U.S. 84, 92-106 (2003). Far from granting new liberty interests to sex offenders, these

decisions reflect the Court's recognition that States have responded appropriately to the great danger that sex offenders, with their uniquely high recidivism rates, present to the American public. This case warrants the Court's review because requiring States to provide hearings to unadjudicated sex offenders before conditioning their parole on participation in sex-offender therapy threatens to impair States' ability to provide effective treatment to offenders on parole and thereby combat sex-offender recidivism.

Finally, this case offers the Court an opportunity to further refine its doctrine regarding whether 28 U.S.C. §2254 or 42 U.S.C. §1983 is the appropriate vehicle for a prisoner to assert a claim of unconstitutional conditions of parole. In recognizing divergent approaches on the issue, seven judges suggested that "[t]he appropriate avenue for challenging the state's treatment of Coleman appears to be through 42 U.S.C. §1983, not habeas." 409 F.3d, at 674 n.8 (Jones, J., dissenting from denial of reh'g en banc); App., at 30-31. The Court should grant the petition for a writ of certiorari to resolve continuing confusion and uncertainty on the issue.

ARGUMENT

I. The Court Should Grant the Petition To Resolve the Circuit Split Regarding Whether It Is "Clearly Established" Federal Law That Unadjudicated Sex-Offender Parolees Are Entitled to a Hearing Before They May Be Required To Participate in Sex-Offender Therapy.

The panel cited cases from the Ninth, Tenth, and Eleventh Circuits that each relied on *Vitek* to conclude that unadjudicated sex offenders have a liberty interest in not being classified as sex offenders and being required to undergo sex-offender treatment as a condition of either parole or the continued receipt of good-time credits to which they were otherwise entitled. 395 F.3d, at 222 n.26 (citing *Chambers*, 205 F.3d, at 1243 (holding that Colorado was obligated to provide hearing before requiring inmate, who had been

charged with sexual assault prior to conviction on unrelated crime that led to prison sentence, to participate in sex-offender therapy or lose good-time credits); App., at 9-10; *Kirby v. Siegelman*, 195 F.3d 1285, 1292 (CA11 1999) (concluding that Alabama's classification as sex offender of inmate, who had been charged with (but not tried for) rape and sexual abuse, and requiring him to participate in sex-offender therapy as condition of parole, implicated liberty interest under Due Process Clause); *Neal*, 131 F.3d, at 831 (requiring Hawaii to provide hearing before compelling inmate, against whom sexual assault charges had been dismissed as part of plea bargain, to participate in sex-offender therapy as condition of parole)). *Chambers*, *Kirby*, and *Neal* were all brought under §1983, which permits suit against state officials for acts under state law that allegedly violate a person's constitutional rights. 42 U.S.C. §1983. The decisions of the Tenth and Ninth Circuits in *Chambers* and *Neal* expressly held that the plaintiffs' damages claims were barred by qualified immunity, thus creating a circuit split with *Coleman* as to whether *Vitek* "clearly established" that unadjudicated sex offenders have a liberty interest in avoiding obligatory participation in sex-offender therapy as a condition of parole.

In determining the applicability of qualified immunity, a court asks whether "the facts alleged show the officer's conduct violated a constitutional right," and if so, "whether the right was clearly established." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). In *Chambers* and *Neal*, the courts of appeals held that the state-official defendants were entitled to qualified immunity from the plaintiff's §1983 claims because it was *not* clearly established, at the time the officials acted, that their actions violated constitutional rights.[6] *See*

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6. The Eleventh Circuit did not address qualified immunity in *Kirby* because it held that the record was inadequate to determine whether the plaintiff had received adequate notice and a hearing. 195 F.3d, at 1287, 1292.

Chambers, 205 F.3d, at 1244; *Neal*, 131 F.3d, at 832 ("No reasonable prison official would have reason to know that the classification of Neal as a sex offender or the requirement that Neal complete the [sex-offender therapy] as a precondition to parole eligibility would implicate a protected liberty interest, let alone that the program violated his due process rights.").

In coming to that conclusion, the Ninth and Tenth Circuits focused principally on one Supreme Court case: *Vitek*. Because *Vitek* did not "clearly establish" for qualified-immunity purposes that unadjudicated sex offenders must be given a hearing before sex-offender therapy is imposed as a condition of parole, *Vitek* could not constitute "clearly established federal law" for the very same proposition for habeas purposes. In short, it is impossible to square the *Chambers* and *Neal* courts' conclusion—that no reasonable official would have believed that *Vitek* established the above constitutional rule—with the panel's holding that the Texas courts' denial of relief was "contrary to" *Vitek* under §2254(d)(1).

The text of the AEDPA mandates that only this Court's holdings can create the "clearly established federal law" that determines whether a petitioner is entitled to federal habeas relief. 28 U.S.C. §2254(d)(1). Therefore, for habeas purposes, [illegible] circuit decisions cited by the panel could not establish that unadjudicated sex offenders are entitled to due process before a State requires them to participate in sex-offender therapy as a condition of parole. Nor has this Court ever issued any subsequent statements, much less holdings, to that effect. To the contrary, only two years ago, the Court explicitly declined to decide whether a state law requiring public registry of sex offenders without affording a hearing to determine individual dangerousness violates substantive due process. *See Conn. Dep't of Pub. Safety*, 538 U.S., at 8.

Thus, nothing has changed since the Tenth and Ninth Circuits' decisions in *Chambers* and *Neal* to make Coleman's putative liberty

interest any more "clearly established" than it was under *Vitek*. And, "[t]hat the panel's decision was not 'dictated' by *Vitek* . . . is ultimately reinforced by the Supreme Court's refusal, in [*Connecticut Dep't of Public Safety v.*] *Doe*, . . . to decide whether a liberty interest exists in not being classified as a sex offender." 409 F.3d, at 674 (Jones, J., dissenting from denial of reh'g en banc); App., at 31-32.

In response to these arguments, the panel on rehearing en banc cited a footnote in *Williams v. Taylor*, 529 U.S. 362 (2000), for the proposition that "[h]abeas law and the law of qualified immunity are 'doctrinally distinct.'" *Id.*, at 668 (quoting *Williams*, 529 U.S., at 380 n.12 (op. of Stevens, J.)). However, that portion of the *Williams* opinion—which represents only a plurality of the Court—does not refute the State's position. Instead, in that footnote, the *Williams* plurality opined only that Congress, in using the phrase "clearly established law" in §2254(d)(1) rather than the "new rule" language from *Teague*, did not intend in §2254(d)(1) "to codify an aspect of the doctrine of executive qualified immunity rather than *Teague*'s antiretroactivity bar." *Williams*, 529 U.S., at 380 n.12 (op. of Stevens, J.). Moreover, a majority of the Court rejected the plurality's analysis of §2254(d)(1). *See id.*, at 403-13 (op. of O'Connor, J.). Thus, the panel's reference to *Williams* fails to rebut the point that a rule cannot be "clearly established federal law" as determined by this Court for habeas purposes while at the same time it is deemed *not* "clearly established" for qualified-immunity purposes:

> "While the AEDPA/*Teague* standard and the test for qualified immunity are 'doctrinally distinct,' we need not ignore their logical similarity. It is *il*logical to conclude that no 'new rule' is made here when the panel (a) orders Texas prison officials, for the first time, to give hearings to sex offenders who were not explicitly convicted of sex offenses; (b) determines such prisoners are now entitled to hearings even if their sex

> offender treatment is fully confidential and amounts to 'talk therapy'; and (c) the other circuits have agreed, through their qualified immunity conclusions, that *Vitek* supports but does not necessarily compel similar results." 409 F.3d, at 673-74 (Jones, J., dissenting from denial of reh'g en banc) (emphasis in original) (citation omitted); App., at 28-32.

The Ninth and Tenth Circuits' qualified-immunity decisions cannot be reconciled with the Fifth Circuit's holding in this case. The Court should grant certiorari to resolve this circuit split.

II. The Panel Below Significantly Expanded Federal Law in Holding that *Vitek v. Jones* Constitutes Clearly Established Federal Law for the Proposition that Unadjudicated Sex Offenders Are Entitled to Due Process Before Being Required To Participate in Sex-Offender Treatment as a Condition of Parole.

A. The Court Should Redress the Court of Appeals's Creation of a Novel Liberty Interest for Unadjudicated Sex Offenders.

"Sex offenders are a serious threat in this Nation." *McKune v. Lile*, 536 U.S. 24, 32 (2002) (plurality op.). Not only do their predatory acts inflict tremendous physical and psychological damage, but recidivism rates are significantly higher for sex offenders than for other criminals. *See id.*, at 33. However, sex-offender treatment programs can be tremendously effective in reducing recidivism. *See id.* (citing statistics estimating that the rate of recidivism of treated sex offenders is consistently around 15 percent, while the recidivism rate for untreated offenders is as high as 80 percent). Thus, as the Court has recognized, Texas and other States have "a vital interest" in rehabilitating sex offenders. *Id.*

There is nothing novel about requiring a prisoner to undergo counseling as an aspect of being released early from

prison—particularly when, as here, the State has good reason to believe that the releasee is a sex offender and should be treated to reduce the high risk of recidivism. The Court's precedent has long recognized that parole release is properly conditioned on compliance with requirements imposed by a state administrative agency. *Morrissey v. Brewer*, 408 U.S. 471, 478 (1972) ("[T]hose who are allowed to leave prison early are subjected to specified conditions . . . restrict[ing] their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen."). Moreover, the Court has never suggested that requiring a releasee to attend counseling to address a sexual-behavior problem amounts to a "grievous loss" of liberty. "Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'" *Id.*, at 481. Because Coleman did not show that he suffered a "grievous loss" by being required to participate in "talk therapy" counseling as a condition of supervised release, the Texas courts did not contravene clearly established federal law by denying Coleman habeas relief.

A fortiori, requiring participation in confidential "talk therapy" as a condition of supervised release is a lesser burden than requiring public registration of sex offenders. Only two years ago, the Court declined to decide whether a law requiring registration of sex offenders without affording a hearing to determine individual dangerousness violates substantive due process. *See Conn. Dep't of Pub. Safety*, 538 U.S., at 8. More recently, the Court rejected the claim that a state law requiring registration of all convicted sex offenders, with no provision for a hearing on dangerousness, is unconstitutional. *Smith v. Doe*, 538 U.S. 84, 92-106 (2003). The panel's creation of a novel liberty interest threatens to impair Texas's ability to reduce sex-offender recidivism because it judicially mandates a hearing process for parolees across the board before they can be made to participate in sex-offender talk therapy.

By granting to unadjudicated sex offenders a liberty interest in avoiding sex-offender therapy, the panel ignored this Court's caution that "federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment" because intrusions into prison administration often result in "squandering judicial resources with little offsetting benefit to anyone." *Sandin v. Conner*, 515 U.S. 472, 482 (1995). More broadly, by granting habeas relief based on a new rule of constitutional law never recognized by this Court, the panel decision"plays havoc with Congress's carefully crafted limitations on federal habeas review." 409 F.3d, at 673 (Jones, J., dissenting from denial of reh'g en banc); App., at 28-30. The Court should grant the petition for a writ of certiorari to remedy the court of appeals's unwarranted expansion and alteration of federal law.

B. Under the AEDPA, Only This Court's Precedent Constitutes Clearly Established Federal Law by Which State Courts Are Bound for Federal Habeas Purposes.

Because Coleman filed his federal habeas petition after April 26, 1996, his petition is governed by the AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 324-26 (1997). Under the AEDPA, a federal court may not grant habeas relief when there was an adjudication of the merits in a state-court proceeding unless the decision by the state court resulted in a decision that was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d); *see Williams*, 529 U.S., at 402-03. Accordingly, "§2254(d) dictates a 'highly deferential standard for evaluating state-court rulings,' which demands that state-court decisions be given the benefit of the doubt." *Bell v. Cone*, 125 S.Ct. 847, 853 (2005) (quoting *Lindh*, 521 U.S., at 333 n.7, and *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)). Only

the first portion of subsection (1)—the requirement that the state-court decision be "contrary to . . . clearly established federal law," 28 U.S.C. §2254(d)(1)—is at issue in this case.

"The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Williams*, 529 U.S., at 405 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 495 (1976)). The phrase "clearly estab[l]shed federal law" in §2254(d)(1) "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (quoting *Williams*, 529 U.S., at 412)). Accordingly, the task of determining what this Court has clearly established will generally be a "straightforward" one. *Id.*, at 72. A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result. *Brown v. Payton*, 125 S.Ct. 1432, 1438 (2005) (citing *Williams*, 529 U.S., at 405; *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam)).

Even prior to the adoption of the AEDPA, a habeas petitioner could not enforce a new rule of federal constitutional law. *See Teague v. Lane*, 489 U.S. 288, 295-96 (1989). As amended by the AEDPA, "§2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus." *Williams*, 529 U.S., at 412. Specifically, the statute allows habeas relief from state-court decisions that contravene federal law only as established by this Court's precedent—not that of lower federal courts. 28 U.S.C. §2254(d)(1). And under the AEDPA, a federal court can disagree with a state court's interpretation of Supreme Court case law without concluding that the state-court decision is "contrary to" this Court's precedent. *See Brown*, 125 S.Ct., at 1442-43 (Breyer, J.,

concurring) (noting the significance of "Congress' instruction to defer to the reasonable conclusions of state-court judges").

C. The Court of Appeals Disregarded the AEDPA's Plain Meaning and Purpose by Refusing To Uphold the Texas State Courts' Reasonable Conclusion That *Vitek* Was Not Controlling on the Record Coleman Presented.

The panel wrongly concluded that *Vitek* constitutes clearly established federal law under the AEDPA for the proposition that a State must provide a hearing to unadjudicated sex offenders before requiring their participation in sex-offender therapy as a condition of parole. 395 F.3d, at 223-24; App., at 8-13. *Vitek* struck down a state law allowing prison inmates to be publicly classified as mentally ill without a hearing and transferred to mental institutions for involuntary treatment and confinement. 445 U.S., at 492-94. *Vitek*'s holding largely turned on what it recognized as the stigma, within the prison community, of being labeled mentally ill. *Id.*, at 492. The facts of *Vitek* did not involve, and the Court's opinion did not address, either (1) the classification of parolees as sex offenders, or (2) sex-offender treatment programs. Thus, "[t]o achieve its desired legal result, the panel extended *Vitek* from the circumstance of inmates' forced mental health treatment to that of forced sex offender registration and therapy." 409 F.3d, at 672 (Jones, J., dissenting from denial of reh'g en banc); App., at 27.

The panel held that Coleman had, under *Vitek*, a liberty interest in not having his parole conditioned upon his participation in sex-offender therapy absent procedural due process. 395 F.3d, at 222-23; App., at 7-9. It concluded that Coleman's initial registration as a sex offender (despite the undisputed fact that he was subsequently de-registered), coupled with sex-offender therapy that allegedly could include what the panel termed "intrusive and behavior-modifying techniques," required the State to provide a hearing before imposing these parole conditions upon Coleman. *Id.*, at 223;

App., at 8-9. The panel further held that the Texas courts' denial of relief was contrary to federal constitutional law clearly established in *Vitek*. *Id.*, at 223-24; App., at 8-13. Accordingly, it declared the conditions placed on Coleman's parole invalid, held that Coleman was entitled to federal habeas relief, and remanded the cause to the district court. *Id.*, at 224-25; App., at 9-15.

In extending *Vitek* beyond its holdings, the panel "misapplied [the] AEDPA and *Teague v. Lane* by making a new rule of law in a habeas case." 409 F.3d, at 670 (Jones, J., dissenting to denial of reh'g en banc); App., at 24. *Vitek* involved a state prisoner's challenge under 42 U.S.C. §1983 to a Nebraska law that authorized the transfer to mental-health facilities of inmates found to suffer from a mental illness not treatable in prison. 445 U.S., at 483-84. The Court held that prisoners were entitled to due process, including a hearing, before being subjected to mental-health transfers and treatment. *See id.*, at 488-91. It observed that, for the ordinary citizen, commitment to a mental hospital produces a "massive curtailment of liberty". *Id.*, at 491 (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)). Significantly, however, the Court noted that "[t]he loss of liberty produced by an involuntary commitment is *more than* a loss of freedom from confinement." *Id.*, at 492 (emphasis added). Instead, *Vitek*'s holding largely turned on the "stigmatizing consequences" of identifying a person as suffering from mental illness. *See id.*, at 492-94.

Expressly relying on the factual findings of the district court, the *Vitek* Court concluded: "It is indisputable that commitment to a mental hospital 'can engender adverse social consequences to the individual' and that '[w]hether we label this phenomena 'stigma' or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual.'" *Id.*, at 492 (quoting *Addington v. Texas*, 441 U.S. 418, 425-26 (1979)). It further cited the district court's findings regarding the use of "mandatory behavior modification systems" in the mental-

health facility. *Id.* Based on those findings, the Court concluded that "the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that requires procedural protections." *Id.*, at 494.

Vitek's holding does not constitute "clearly established Federal law" for the proposition that States must provide unadjudicated sex offenders a hearing before requiring them to attend confidential sex-offender treatment as a condition of parole. *Vitek* held that convicted felons are entitled to due process before being (1) publicly labeled mentally ill and (2) transferred to a mental hospital for treatment involving mandatory behavior modification. Thus, *Vitek* does not control Coleman's application for habeas relief—especially when viewed through the AEDPA's restrictive lens—because Coleman's failure to develop the facts precludes a finding on either element.[7] Moreover, Coleman's conditional release would not have entailed the "massive curtailment of liberty" associated with involuntary commitment to a mental hospital. *Vitek*, 445 U.S., at 491. To the contrary, Coleman was given a

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7. Even outside of the context of the AEDPA's restricted review, federal courts of appeals generally cannot consider material on appeal that is outside the district court record. *See, e.g. United States v. Kennedy*, 225 F.3d 1187, 1191 (CA10 2000). Indeed, "[t]he only proper function of a court of appeals is to review the decision below on the basis of the record that was before the district court." *Fassett v. Delta Kappa Epsilon*, 807 F.2d 1150, 1165 (CA3 1986), *cert. denied*, 481 U.S. 1070 (1987). This Court has long recognized a similar rule. *See Boone v. Chiles*, 35 U.S. (10 Pet.) 177, 208 (1836) (noting that appellate courts "can act on no evidence which was not before the court below"); *see also Simmons v. United States*, 348 U.S. 397, 404 (1955) (rejecting party's reliance on "a document which is not in the record and which was not open to attack or explanation in the trial court").

significant *expansion* of liberty when he was released from prison into society—subject to the condition that he attend talk therapy. This is a critical distinction between *Vitek* and Coleman's facts.

The seven judges dissenting en banc recognized *Vitek*'s inapplicability: "Even if it is logical to make the constitutional leap from treatment of the mentally ill, who are helpless as to their condition and its consequences, to sex offenders, who are predators, the twin factual constraints of *Vitek*—stigmatizing consequences and mandatory behavior modification—are lacking in this case." 409 F.3d, at 671 (Jones, J., dissenting from denial of reh'g en banc); App., at 25. A closer examination of those twin constraints shows that the dissent is correct, and that the panel disregarded the AEDPA's mandate of restricted review.

1. Registration Is Not an Issue in This Case.

This case is not about registration. The panel's original opinion appeared also to be partially based on Coleman's initial registration as a sex offender, before he was de-registered, as the opinion discussed the therapy conditions in tandem with registration. 395 F.3d, at 219, 223, 225; App., at 1-3, 8-9, 13-15. However, sex-offender registration is not an issue in this case because it is undisputed that the revocation of Coleman's parole—the basis of his habeas complaint—was based solely on his failure to attend therapy. Indeed, the panel on rehearing both recognized the removal of Coleman's name from the registry and clarified that its finding of a "stigma" did not depend on whether Coleman was registered. 409 F.3d, at 668 ("The stigma aspect of the case is thus not mooted by the state's decision to remove Coleman from its sex offender registry."); App., at 19.

As the dissent pointed out, there is a "jurisdictional requirement that a live controversy exist at *all* stages of the litigation." *Id.*, at 671 n.3 (Jones, J., dissenting from denial of reh'g en banc) (emphasis in original) (citing *United States Parole Comm'n v.*

Geraghty, 445 U.S. 388, 396-97 (1980), and *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)); App., at 26. The panel should have recognized Coleman's registration complaint as moot due to the BPP's voluntary removal of registration as a condition of Coleman's release. However, by acknowledging that the BPP's revocation of Coleman's parole turned solely on his failure to participate in sex-offender therapy, the panel implicitly recognized that registration is no longer an issue in this case.

2. Coleman Neither Pleaded Nor Proved That His Sex-Offender Treatment Would Result in the Type of "Stigma" Addressed in *Vitek*.

Relying on extra-record materials, the panel assumed that "confidentiality is not maintained" during sex-offender therapy, 395 F.3d, at 224, and that "by requiring [Coleman] to attend sex offender therapy, the state labeled him a sex offender," 409 F.3d, at 668 (op. on reh'g en banc) (per curiam); App., at 19. Thus, an inherent assumption in the panel's extension of *Vitek*'s "stigma" theory is that either the requirement to attend therapy or the details of treatment would be known to someone other than the treatment providers, participants, and the parole authorities. Nothing in the record, however, shows that others actually knew or would have known. The panel's assumption of non-confidentiality, which is wrong as a matter of both law and fact, undergirds its flawed conclusion that *Vitek* is controlling precedent.

Pursuant to Texas statute, information revealed in treatment sessions is expressly confidential by law, subject only to narrow exceptions—not applicable here—concerning law enforcement authorities, criminal justice agencies, and certain health-care professionals. *See* TEX. OCC. CODE §§109.051-.053; *see also* TEX. GOV'T CODE §508.313(a), (c) (information relating to inmates subject to release on parole or mandatory supervision is confidential, subject to release to eligible entities for "law

enforcement, prosecutorial, correctional, clemency, or treatment purpose"). Thus, with respect to the general public—and contrary to the panel's assumption—sex-offender treatment is confidential by law. 409 F.3d, at 671 ("[T]he panel overlooked that the state expressly protects the confidentiality of sex therapy records.") (Jones, J., dissenting from denial of reh'g en banc); App., at 26.

More significantly, the panel's assumption of non-confidentiality violates the AEDPA's command that federal courts should not second-guess state-court decisions by relying on allegations not developed as facts in the state courts. The "AEDPA mandates that the reasonableness of a state court's factual findings be assessed 'in light of the evidence presented in the State court proceeding,'" and "circumscribes the ability of federal habeas litigants to present evidence that they 'failed to develop' before the state courts." *Miller-El v. Dretke*, 125 S.Ct. 2317, 2348 (2005) (Thomas, J., dissenting) (quoting 28 U.S.C. §2254(d)(2), (e)(2), and citing *Williams*, 529 U.S., at 429-30)). Coleman offered no evidence, in either the state-court proceedings or the federal district court, that the requirement to attend sex-offender counseling was known by or disseminated to anyone other than the parole authorities and Coleman's therapists. By declaring Coleman's therapy non-confidential despite his failure to prove that the fact and details of his treatment would not be kept confidential, the panel ignored the AEDPA's directive that federal courts should rely only upon evidence developed in state-court proceedings.

On motion for rehearing en banc, the panel did not disagree with either the fact that Coleman offered no evidence of stigma or the legal effect of Texas's statutory confidentiality provisions. Instead, it asserted that "*Vitek* does not require publication to establish stigma." 409 F.3d, at 668; App., at 19. This assertion misreads *Vitek*, as does the panel's conclusion that the State "labeled" Coleman a sex offender simply by requiring him to attend sex-offender therapy—regardless of whether that requirement was

known to Coleman's peers. *See id.* By being forced to attend talk therapy—confidential by law, with respect to the general public—Coleman was not branded with the same public "stigma" as an individual declared mentally ill and openly incarcerated in a mental hospital. *See Vitek*, 445 U.S., at 492. For stigma to exist, others must have known—yet Coleman neither pleaded nor proved this fact in state court. The panel's assumption of stigma contrasts sharply with *Vitek*'s explicit reliance on the factual findings made by the district court. *See id.*, at 492-94.

Coleman's *pro se* arguments described the nature of the stigma he suffered as general embarrassment and injury to reputation.[8] R.42, 109-110. But this Court's precedent establishes that the Due Process Clause does not create a liberty interest in reputation alone. *See Paul v. Davis*, 424 U.S. 693, 701 (1976) (rejecting notion "that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause"). The requirement that the plaintiff must show more than just damage to reputation has been described as the "stigma-plus" test. *See Siegert v. Gilley*, 500 U.S. 226, 231-34 (1991) (following *Paul* and holding that qualified immunity defense suit claiming that allegedly defamatory statements made by defendant, a government employee, infringed on plaintiff's constitutional rights, because plaintiff failed to allege a violation of a clearly established constitutional right). "By transforming the *Paul v. Davis* 'stigma-plus' test into

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8. To prevail, Coleman presumably would have had to demonstrate that any "injury" to his reputation from confidential sex-offender treatment would result in a demonstrably worse reputation than that already generated from his multiple prior convictions and his prior indictment for the aggravated sexual assault of a twelve-year-old girl with mental disabilities.

'plus=stigma,' the panel's conception of a 'liberty interest' stands current Supreme Court caselaw on its head." 409 F.3d, at 672 (Jones, J., dissenting from denial of reh'g en banc); App., at 27-28.

Nor do the panel's conclusions follow from the mere fact that the *Vitek* Court did not specifically declare the inmate's classification and transfer non-confidential. *Id.*, at 668; App., at 19-20. The statute in *Vitek* authorized the segregation and transfer of a prisoner due to mental illness—actions that would not pass unnoticed by fellow prisoners. 445 U.S., at 483 n.1. Indeed, it was presumably for that reason that the district court found, and this Court agreed, that the characterization and transfer would have "stigmatizing consequences." *Id.*, at 488. By contrast, nothing about Coleman's circumstances—a parolee reporting to a therapist's office for confidential treatment outside of the confines of prison—would notify others in the relevant community of the parolee's status. Because Coleman did not prove that any member of the general public knew of his obligation to attend sex-offender therapy, his parole conditions did not create—in either fact or law—the type of stigma that the Court found in *Vitek* to require due-process safeguards prior to implementing.

3. Coleman Neither Pleaded Nor Proved That His Sex-Offender Therapy Would Involve Intrusive Behavior Modification.

The panel's erroneous finding of a liberty interest in avoiding sex-offender treatment was also premised on its assumption—unsupported by the record—that Coleman's particular therapy could include the use of a penile plethysmograph[9] and the

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9. The panel described a penile plethysmograph as a "strain gauge [which is] strapped to an individual's genitals while sexually explicit pictures are displayed in an effort to determine his sexual arousal patterns." 395 F.3d, at 224 & n.28 (quoting *Harrington v. Almy*, 977

forced ingestion of psychiatric medications. 395 F.3d, at 224 & n.28; App., at 9-13. The panel concluded that Coleman's reference, in a supplemental brief, to a website sponsored by the Texas Department of Health that discussed those measures as part of a "multifaceted treatment program"[10] constituted evidence that he in fact would be subjected to them. *Id.*, at 224 n.28; App., at 9-13 .

Coleman never pointed to any record evidence (because there is none) to show that his therapy would in fact expose him to intrusive behavior-modifying techniques. Indeed, the record does not show that he had any obligations beyond attending therapy and answering a questionnaire. R.105. The seven judges dissenting below accurately summarized the panel's erroneous assumptions:

> "[T]he panel relied on 'facts' outside those provided the state courts in asserting that Coleman would suffer invasive physical procedures. The only basis for this part of the panel opinion is its judicial notice of a state government website. The website discusses the use of 'multifaceted' sex offender treatment regimes, which may or may not

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F.2d 37, 44 (CA1 1992)); App., at 10 . Penile plethysmographs are pure measurement devices; they detect arousal, but do not apply any sort of negative or positive stimulus in the process. *See, e.g., Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1262 (CA9 2000); *see also* COUNCIL ON SEX OFFENDER TREATMENT, TEX. DEP'T OF STATE HEALTH SERVS., TREATMENT OF SEX OFFENDERS - OFFENSE SPECIFIC SEX OFFENDER TREATMENT (2005), *available at* http://www.dshs.state.tx.us/csot/csot_tspecific.shtm (describing penile plethysmograph as a "diagnostic method used to assess sexual arousal").

10. On September 1, 2004, the Texas Department of State Health Services was created by merging the Texas Department of Health with several other state agencies. The document the panel cited that was previously available on the TDH website is COUNCIL ON SEX OFFENDER TREATMENT, *supra* at 23 n.9.

include the more invasive techniques the panel asserted as demonstrated fact. None of this discussion is probative as to Coleman, who never attended any therapy sessions, never experienced any invasive treatments, and did not and could not submit any evidence in state or federal court about the therapy sessions he would have been expected to attend. The panel's conclusions about what his particular therapy regime would entail are pure conjecture." 409 F.3d, at 672 (Jones, J., dissenting from denial of reh'g en banc); App., at 26-27.

As discussed below, the AEDPA's restrictive lens forbids federal courts from assuming facts that were neither alleged nor proven in state court. *See Bell v. Cone*, 535 U.S. 685, 697 n. 4 (2002) (declining to consider evidence not presented to state court in determining whether its decision was contrary to federal law). Instead, the AEDPA generally requires federal courts to consider habeas petitions based on the facts developed in state-court proceedings. *See* Part II.C.4, *infra.*

It is undisputed that Coleman did not plead or prove in the state courts that he would have been forced to undergo plethysmograph testing or ingest psychiatric medications. The panel's assumption of unproven facts ignores "AEDPA's clear purpose[:] to encourage litigants to pursue claims in state court prior to seeking federal collateral review." *Duncan v. Walker*, 533 U.S. 167, 181 (2001). Because this case does not involve "a set of facts materially indistinguishable from those presented in any of this Court's clearly established precedents," the state courts' decision not to extend *Vitek* into an entirely different context was not contrary to *Vitek*. *See Price v. Vincent*, 538 U.S. 634, 640 (2003) (holding that state supreme court's determination that state trial judge's comments on defendant's motion for directed verdict on first degree murder charge were not sufficiently final to constitute a judgment of

acquittal for double jeopardy purposes was not contrary to clearly established federal law for habeas purposes).

4. Both the AEDPA and This Court's Precedent Preclude Federal Courts From Assuming Facts Not Developed in State-Court Proceedings.

The panel's assumptions that Coleman's treatment would be stigmatizing and of an invasive, behavior-modifying nature contradict this Court's recognition that "[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Williams*, 529 U.S., at 437. Coleman did not argue, and the panel did not find, that the proceedings in the Texas courts "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d)(2). Further, the federal habeas statute specifies that facts determined by a state court "shall be presumed to be correct," and it assigns to the applicant the burden of rebutting the presumption of correctness by clear and convincing evidence. *Id.* §2254(e)(1).

The AEDPA also tightly constrains the circumstances in which a federal court can grant a habeas petitioner an evidentiary hearing to develop facts not developed in state-court proceedings. *See id.* §2254(e)(2). First, the applicant's claim must rely on "(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence." *Id.* §2254(e)(2)(A). Second, the applicant must show that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. *Id.* §2254(e)(2)(B).

Coleman cannot satisfy the standards required by either subsection of §2254(e)(2). And even if he could, that provision would not automatically qualify him for habeas relief. Instead, it would entitle him only to an evidentiary hearing to develop facts pertaining to the confidentiality and nature of his treatment. *See Holland v. Jackson*, 124 S.Ct. 2736, 2738 (2004) (per curiam). The court of appeals's assumption of facts neither pleaded nor proved by Coleman in state court circumvents the AEDPA's strict limits on the development of evidence outside the state-court proceedings, and it violates the procedures for such evidentiary development—when allowed—described therein.

In *Holland*, the Court reversed the Sixth Circuit's grant of habeas relief based on extra-record evidence. Following his murder conviction in Tennessee, Jackson sought post-conviction relief, claiming ineffective assistance of counsel. *See id.*, at 2736. The state trial court denied his petition following an evidentiary hearing. *See id.* Jackson later sought another hearing and a new trial based on his claim of newly discovered evidence in the form of testimony from a potential witness, Gooch, who did not testify at trial. *See id.*, at 2737. The trial court denied both the motion and Jackson's petition for relief. The Tennessee Court of Criminal Appeals affirmed, holding that Jackson had not shown adequate cause for previously failing to present the evidence. *See id.*

The Sixth Circuit concluded that the previously unadduced testimony demonstrated ineffective assistance of counsel; accordingly, it found the state courts' denial of relief an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), and granted Jackson's petition for federal habeas relief. *See id.* This Court reversed. Noting that the state court had specifically identified the extra-record nature of the testimony as a basis for denying relief, the Court held that the Sixth Circuit had erred to rely on that evidence in finding the state courts' application of *Strickland* unreasonable under §2254(d):

> "Under the habeas statute, Gooch's statement could have been the subject of an evidentiary hearing by the District Court, but only if [Jackson] was not at fault in failing to develop that evidence in state court, or (if he was at fault) if the conditions prescribed by §2254(e)(2) were met. *Those same restrictions apply a fortiori when a prisoner seeks relief based on new evidence without an evidentiary hearing.*" *Holland*, 124 S.Ct., at 2738 (citing, *inter alia*, *Williams*, 529 U.S., at 431-37) (emphasis added).

Holland's reasoning supports reversal of the decision below. Although Coleman did not plead or prove that his sex-offender treatment would involve intrusive behavior-modification techniques or stigmatize him in any way, the panel assumed both factual predicates—leading to its erroneous conclusion that the state courts' denial of relief was contrary to *Vitek*. Thus, "[o]n the record he advanced, Coleman should not receive habeas relief entitling him to a hearing before he undergoes mandatory sex offender counseling." 409 F.3d, at 670 (Jones, J., dissenting from denial of reh'g en banc); App., at 23.

Principles of comity and federalism dictate that when a state prisoner alleges that his confinement violates federal constitutional law, the state courts should have the first opportunity to review this claim and provide any necessary relief. *See Duncan*, 533 U.S., at 178-79; *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999). By allowing a federal court's assumptions to substitute for facts that were not presented to the state courts, the panel decision undermines the AEDPA's goals of promoting comity and federalism. The Court's review is warranted to correct this significant misinterpretation of federal law.

III. The Court Should Grant the Petition for Certiorari To Resolve Continuing Confusion as to Which Federal Law—the Civil Rights Law or the Habeas Statute—Is the Proper Vehicle for Unadjudicated Sex Offenders To Challenge Allegedly Unconstitutional Conditions of Parole.

As discussed above, the Ninth, Tenth, and Eleventh Circuits addressed similar claims by unadjudicated sex-offenders in the context of civil-rights claims under 42 U.S.C. §1983—not federal habeas law. *See Chambers*, 205 F.3d 1237; *Kirby*, 195 F.3d 1285; *Neal*, 131 F.3d 818; *see also Gunderson v. Hvass*, 339 F.3d 639, 643-44 (CA8 2003) (concluding that a Minnesota statute that required a person charged with sexual assault but convicted of non-sexual assault to register as predatory offender did not violate procedural or substantive due process, and affirming dismissal of plaintiff's §1983 claims on summary judgment). The seven Fifth Circuit judges dissenting in the present case observed that "[t]he other circuits' §1983 decisions also raise a serious question whether the panel properly decided this as a habeas case. . . . The appropriate avenue for challenging the state's treatment of Coleman appears to be through 42 U.S.C. §1983, not habeas." 409 F.3d, at 673 n.8 (Jones, J., dissenting from denial of reh'g en banc) (citing, *inter alia*, *Wilkinson v. Dotson*, 125 S.Ct. 1242, 1250 (2005) (Scalia, J., concurring) (suggesting that the federal habeas statute does not "authorize[] federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody")); App., at 30. This divergence recalls the observation, made by the Fifth Circuit more than a decade earlier, that "[t]he line between claims which must initially be pressed by writ of habeas corpus and those cognizable under §1983 is a blurry one." *Cook v. Tex. Dep't of Criminal Justice Transitional Planning Dep't*, 37 F.3d 166, 168 (CA5 1994).

In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the Court held that a prisoner in state custody cannot use a §1983 action to

challenge the "fact or duration of his confinement." *Id.*, at 489. While recognizing that such claims would fall within the scope of §1983's broad language, the Court recognized an implicit exception for actions that lie "within the core of habeas corpus." *Id.*, at 487. The State does not dispute that Coleman's claims in this case were properly raised in habeas. However, the opposing views in the court of appeals, and the fact that similar claims have been raised under §1983 in other circuits, reflect continuing uncertainty on the issue and a need for further clarification.

Since *Preiser*, the Court has on several occasions addressed whether a prisoner's claim may be brought under §1983 or is cognizable exclusively in habeas. *See Wilkinson*, 125 S.Ct. 1242 (holding that state prisoners may bring §1983 action for declaratory and injunctive relief challenging the constitutionality of state parole procedures, and need not seek relief exclusively in habeas corpus); *Edwards v. Balisok*, 520 U.S. 641 (1997) (holding that habeas was exclusive vehicle to challenge prison disciplinary procedures seeking declaratory relief and money damages but not restoration of good-time credits); *Heck v. Humphrey*, 512 U.S. 477 (1994) (holding that a state prisoner's claim for damages is exclusively cognizable in habeas if a judgment in the plaintiff's favor necessarily implies the invalidity of his conviction or sentence, unless the conviction or sentence was previously invalidated); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (holding that inmate's claim for injunction to restore good-time credits was not cognizable under §1983, but declaratory-judgment claim was not barred as a predicate to a damage award). The Court has not, however, squarely addressed the converse: whether claims that lie outside of *Preiser*'s "core of habeas corpus" are cognizable exclusively under §1983. That question is presented here, and the Court should grant Texas's petition for a writ of certiorari to address it and the other significant issues of federal law raised by the court of appeals's decision granting Coleman habeas relief.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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August 10, 2005

(2)

Supreme Court, U.S.
FILED

05-218 AUG 11 2005

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Petitioner,

v.

TONY RAY COLEMAN,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX

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United States Court of Appeals,
Fifth Circuit.
Tony Ray COLEMAN, Petitioner-Appellant,
v.
Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellee.
No. 03-50743.

Dec. 21, 2004.

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Ana Jordan (argued), Office of Atty. Gen. for State of TX, Austin, TX, for Respondent-Appellee.

Appeal from the United States District Court for the Western District of Texas.

Before REAVLEY, BENAVIDES and PRADO, Circuit Judges.

REAVLEY, Circuit Judge:

Tony Ray Coleman appeals the district court's denial of his application for writ of habeas corpus and contends that the state must provide due process before imposing sex offender registration and therapy as conditions to the release on mandatory supervision of a prisoner who has never been convicted of a sex crime. We agree that it must.

I. *Background*

Coleman was convicted of burglary of a habitation in 1986 and sentenced to thirty years incarceration. He was paroled in 1991. While on parole, the state indicted Coleman for aggravated sexual assault of a child and indecency with a child by contact. He pleaded guilty to and was convicted of only misdemeanor assault. The state

revoked his parole following the assault conviction and he was reincarcerated.

On January 17, 2001, Coleman was released on mandatory supervision on the condition that he reside in a halfway house until employed. [FN1] On February 27, 2001, the parole panel imposed two additional conditions on his release, requiring him to register as a sex offender and attend sex offender therapy. Coleman was not given advance notice or a hearing to contest the imposition of these conditions. He registered, but failed to enroll or participate in therapy. As a result, his parole was revoked on July 9, 2001.

> FN1. "Mandatory supervision" is "the release of an eligible inmate so that the inmate may serve the remainder of the inmate's sentence not on parole but under the supervision of the pardons and paroles division." Tex. Gov't Code § 508.001(5) (Vernon 2004). The parole panel must release an inmate on mandatory supervision when his calendar time plus accrued good-conduct time equals the maximum term to which he was sentenced. *Id.* § 508.147(a). Release on parole, on the other hand, is discretionary with the panel. *Id.* §§ 508.001(6); 508.141. Once released, an inmate on mandatory supervision is considered to be on parole. *Id.* § 508.147(b). Because the distinction between mandatory supervision and parole is not highly relevant to the issues at hand, we will use the simpler term "parole" for the remainder of this opinion.

Coleman challenged the revocation in a *pro se* habeas petition, alleging violations of the Due Process and Ex Post Facto Clauses of the federal Constitution. The Texas Court of Criminal Appeals denied the petition without written order on May 29, 2002. Coleman then filed his federal habeas petition under 28 U.S.C. §

2254, also *pro se*. On June 4, 2003, the district court denied the petition. This court granted Coleman a certificate of appealability on his due process claims. [FN2]

> FN2. We reject the state's argument that Coleman should have brought the present suit under 42 U.S.C. § 1983 rather than as a habeas petition. Generally, § 1983 suits are the proper vehicle to attack unconstitutional conditions of confinement. *Cook v. Tex. Dep't of Criminal Justice Transitional Planning Dep't*, 37 F.3d 166, 168 (5th Cir.1994). A habeas petition, on the other hand, is the proper vehicle to challenge the fact of confinement and seek release from custody. *Id.* Here, Coleman argues that the conditions placed on his parole were unconstitutional, and thus his failure to abide by those conditions should not have resulted in his reconfinement. Because he seeks release, Coleman correctly brought suit under the habeas statute. *Id.*

***220** II. *Procedural Default*

The state contends that Coleman procedurally defaulted two of his claims by failing to include them in his state habeas petition or properly supplement the petition. Coleman responds that his claims were fairly presented in his state petition and his self-styled "reply" to the state's general denial. We review whether a habeas petitioner's claims have been procedurally defaulted *de novo*. [FN3]

FN3. *Boyd v. Scott*, 45 F.3d 876, 877 (5th Cir.1994).

Procedural default can occur in two ways. First, "[i]f a state court clearly and expressly bases its dismissal of a prisoner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for dismissal, the prisoner has procedurally defaulted his federal habeas claim." [FN4] Second, if the prisoner fails to exhaust available state remedies, and the state court to which the prisoner would have to present his claims in

order to exhaust them would find the claims procedurally barred, the prisoner has defaulted those claims. [FN5]

> FN4. *Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir.1997); *see also Harris v. Reed*, 489 U.S. 255, 263, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) (holding that "a procedural default does not bar consideration of a federal claim on ... habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a procedural bar." (internal quotation marks omitted)).
>
> FN5. *Nobles*, 127 F.3d at 420.

The Texas Court of Criminal Appeals did not "clearly and expressly" base its denial of Coleman's application on a procedural rule, so the first kind of procedural default is not present here. [FN6] The state argues that Coleman did not exhaust his state remedies, because he never properly presented two of his claims to the state court. A prisoner fairly presents a claim to the state court when she asserts the claim "in terms so particular as to call to mind a specific right protected by the Constitution" or alleges "a pattern of facts that is well within the mainstream of constitutional litigation." [FN7]

> FN6. The court denied the application on without written order and did not articulate its reasoning.
>
> FN7. *Evans v. Court of Common Pleas*, 959 F.2d 1227, 1231-33 (2d Cir.1992) (internal quotation marks omitted); *see Gartrell v. Lynaugh*, 833 F.2d 527, 528-29 (5th Cir.1987).

We conclude that Coleman's reply adequately presented his claims to the state court. Coleman made those claims in his reply filed with the state trial court twelve days before it issued its recommendation and forwarded the habeas record to the Texas Court of Criminal Appeals. The Court of Criminal Appeals

received his reply one month before it denied his petition. The state courts thus had ample time to consider all of Coleman's claims, and no evidence indicates that they regarded his reply as untimely. The state courts' failure to expressly rule on those claims does not prevent the claim from *221 being exhausted. [FN8] Coleman successfully exhausted his state remedies and has not defaulted any claims.

FN8. *Ridgway v. Baker,* 720 F.2d 1409, 1412-13 (5th Cir.1983).

III. *Procedural Due Process*

Coleman argues that the parole panel's imposition of sex offender registration and therapy as conditions to his parole, without providing him the opportunity to contest his sex offender status, violated his right to due process. We review the district court's denial of habeas relief on this legal issue *de novo.* [FN9] Where, as here, the state court has adjudicated the merits of a state petition on a question of law, we must affirm the state's denial of habeas relief unless the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." [FN10] A state court's decision is "contrary to" federal law if the court "arrive[d] at a conclusion opposite to that reached by [the Supreme] Court on a question of law or decides a case differently than [the] Court has on a set of materially indistinguishable facts." [FN11]

FN9. *Moody v. Johnson,* 139 F.3d 477, 480 (5th Cir.1998).

FN10. 28 U.S.C. § 2254(d)(1); *Corwin v. Johnson,* 150 F.3d 467, 471 (5th Cir.1998).

FN11. *Williams v. Taylor,* 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

The Court's precedent dictates that Coleman's right to procedural due process depends on a two-step inquiry. We must first determine whether Coleman had a liberty interest in not having sex offender conditions placed on his parole, and, if so, whether the state provided constitutionally sufficient procedures before imposing them. [FN12] The state does not dispute that it provided no process in imposing the conditions, and that Coleman, not having been convicted of a sex offense, has never had an opportunity to contest his sex offender status. Thus, if federal law, clearly established by the Court, requires the conclusion that Coleman had a liberty interest in being free from sex offender conditions, we must grant him relief.

FN12. *Kentucky Dep't of Corr. v. Thompson,* 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989).

A liberty interest may arise from two sources--the Due Process Clause itself or state law. [FN13] Liberty interests may be circumscribed, however, when an individual has been convicted of a crime. [FN14] Convicted criminals' liberty interests are subject to "the nature of the regime to which they have been lawfully committed." [FN15] Even so, "prisoners do not shed all constitutional rights at the prison gate." [FN16] Despite the restrictions imposed by incarceration, the Due Process Clause guarantees a prisoner some process before the government can impose conditions that are " 'qualitatively different' from the punishment characteristically suffered by a person convicted of [the] crime, and [which have] 'stigmatizing consequences.' " [FN17]

FN13. *Sandin v. Conner,* 515 U.S. 472, 477-84, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995).

FN14. *Chapman v. United States,* 500 U.S. 453, 465, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991); *Wolff v. McDonnell,* 418 U.S. 539, 556, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

FN15. *Wolff*, 418 U.S. at 556, 94 S.Ct. 2963; *see Morrissey v. Brewer*, 408 U.S. 471, 478, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (stating that parolees must abide by conditions of parole).

FN16. *Sandin*, 515 U.S. at 485, 115 S.Ct. 2293.

FN17. *Sandin*, 515 U.S. at 479 n. 4, 115 S.Ct. 2293 (quoting *Vitek v. Jones*, 445 U.S. 480, 493-94, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980)).

*222 Restrictions also attend parole, "an established variation on imprisonment of convicted criminals." [FN18] These conditions of release are necessary to achieve parole's purpose of reintegrating the individual into society while preventing further antisocial acts. [FN19] However, as in the prison context, a condition may present such a "dramatic departure from the basic conditions" of a parolee's sentence that the state must provide some procedural protections prior to its imposition. [FN20]

FN18. *Morrissey*, 408 U.S. at 477, 92 S.Ct. 2593.

FN19. *Id.* at 478-80, 92 S.Ct. 2593.

FN20. *See Felce v. Fiedler*, 974 F.2d 1484 (7th Cir.1992) (holding that state may not condition parole on parolee's involuntary treatment with psychotropic medication absent procedural protections); *cf. Sandin*, 515 U.S. at 485, 115 S.Ct. 2293; *Vitek v. Jones*, 445 U.S. 480, 491-92, 100 S.Ct. 1254, 63 L.Ed.2d 552; *Morrissey*, 408 U.S. at 481, 92 S.Ct. 2593 ("Whether any procedural protections are due depends on the extent to which an individual will be condemned to suffer grievous loss." (internal quotation marks omitted)).

Coleman argues that, under the Court's decision in *Vitek v. Jones*, the sex offender conditions placed on his parole present such a dramatic departure from the basic conditions of parole that the Due

Process Clause of the Fourteenth Amendment mandates procedural protections. [FN21] In *Vitek*, the Court found unconstitutional a state law that allowed prison officials to identify inmates as mentally ill and transfer them to mental institutions for involuntary confinement and treatment without a hearing. [FN22] Because of the associated stigma, the Court held that involuntary commitment to an institution went beyond the ordinary loss of freedom suffered by inmates. [FN23] The Court noted that "[a]mong the historic liberties protected by the Due Process Clause is the right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." [FN24] Based on the combination of stigma and compelled behavior modification treatment, the court held that the inmate had been deprived of a protected liberty interest, and thus the state was required to provide procedural protections. [FN25]

FN21. *See Vitek*, 445 U.S. at 491-494, 100 S.Ct. 1254.

FN22. *Id.* at 494, 100 S.Ct. 1254.

FN23. *Id.* at 492, 100 S.Ct. 1254.

FN24. *Id.* (internal quotation marks omitted).

FN25. *Id.* at 494, 100 S.Ct. 1254.

Applying *Vitek* in the sex offender arena, the Ninth and Eleventh Circuits have held that prisoners who have not been convicted of a sex offense have a liberty interest created by the Due Process Clause in freedom from sex offender classification and conditions. [FN26] We agree. ***223** The facts of the present case are materially indistinguishable from *Vitek*. As in *Vitek*, the state imposed stigmatizing classification and treatment on Coleman without providing him any process. [FN27] The state's sex offender therapy, involving intrusive and behavior-modifying techniques, is also analogous to the treatment provided for in *Vitek*. [FN28] Although many parolees are required to participate in some form of counseling or treatment as a condition on their release, we find that,

due to its highly invasive nature, Texas's sex offender therapy program is "qualitatively different" from other conditions which may attend an inmate's release. [FN29] Accordingly, the Due Process Clause, as interpreted in *Vitek*, provides Coleman with a liberty interest in freedom from the stigma and compelled treatment on which his parole was conditioned, and the state was required to provide procedural protections before imposing such conditions. [FN30] Because the state *224 court held otherwise, its conclusion contravened clearly established federal law, and we therefore reverse the district court's denial of habeas relief.

FN26. *Kirby v. Siegelman*, 195 F.3d 1285, 1292 (11th Cir.1999) (holding that a state's classification of a prisoner as a sex offender and requirement that he complete sex offender treatment as a precondition to parole eligibility implicated a liberty interest under the Due Process Clause); *Neal v. Shimoda*, 131 F.3d 818, 831 (9th Cir.1997) (holding that a state must provide a hearing before classifying a prisoner as a sex offender and requiring the prisoner to complete a treatment program as a condition to parole eligibility); *cf. Chambers v. Colo. Dep't of Corr.*, 205 F.3d 1237, 1243 (10th Cir.2000) (holding that the state's imposition of sex offender status on an inmate never convicted of a sex offense, combined with a reduction in good time credits if the inmate did not participate in treatment, implicated a state-created liberty interest).

On the other hand, the Eighth Circuit has held that the state need not afford a prisoner any process before requiring him to register under the state's predatory offender registration statute. *Gunderson v. Hvass*, 339 F.3d 639 (8th Cir.2003). *Gunderson* is distinguishable from the present case, however, because the prisoner there complained only of harm to his reputation. *Id.* at 644; *see generally Paul v. Davis*, 424 U.S. 693, 712, 96 S.Ct. 1155, 47 L.Ed.2d 405

(1976) (holding that harm to reputation alone does not implicate a liberty interest protected by the Due Process Clause). In the present case, the panel required Coleman to register *and* attend sex offender therapy. Indeed, in *Gunderson,* the court noted that due process protections may be required where harm to reputation is coupled with "some other tangible element." *Id.; see also Vitek,* 445 U.S. at 494, 100 S.Ct. 1254 (holding that "the stigmatizing consequences of a transfer to a mental hospital ... coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that require procedural protections.").

FN27. *See Vitek,* 445 U.S. at 492, 100 S.Ct. 1254 (describing stigma as a phenomenon creating "adverse social consequences to the individual"); *Neal,* 131 F.3d at 829 ("We can hardly conceive of a state's action bearing more 'stigmatizing consequences' than the labeling of a prison inmate as a sex offender.").

FN28. The Council on Sex Offender Treatment is charged with developing strategies to treat Texas sex offenders. Tex. Occ.Code § 110.151 (Vernon 2004). The Council provides information regarding treatment strategies at http://www.tdh.state.tx.us/hcqs/plc/csottreatment.htm#information. Such strategies range from counseling and medication to treatment with a penile plethysmograph (a "strain gauge [which is] strapped to an individual's genitals while sexually explicit pictures are displayed in an effort to determine his sexual arousal patterns." *Harrington v. Almy,* 977 F.2d 37, 44 (1st Cir.1992)).

It is unclear exactly what procedures Coleman would be subjected to during his course of treatment. Coleman asserts that he would be subject to psychiatric medication and treatment with plethysmographs, as discussed on the Council's website. Because the state has not contested this assertion, we accept Coleman's characterization of Texas' sex offender therapy.

FN29. *See Morrissey*, 408 U.S. at 478, 92 S.Ct. 2593 (discussing common parole conditions).

FN30. The state argues that, because the Supreme Court has never specifically held that the imposition of sex offender conditions without a hearing on a parolee who was never convicted of a sex offense violates due process, the state's denial of Coleman's habeas petition cannot be contrary to, or an unreasonable application of, the Court's precedent. The state's argument interprets the habeas statute too narrowly. Such a view would preclude habeas relief in any case with facts that did not exactly replicate the facts of a Supreme Court decision. The inquiry, instead, is whether the Court has reached a decision on a set of "materially indistinguishable facts." *Williams*, 529 U.S. at 413, 120 S.Ct. 1495; *see Yarborough v. Alvarado*, 541 U.S. 652, 124 S.Ct. 2140, 2151, 158 L.Ed.2d 938 (2004) ("Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.").

The state further notes that the Court has held that due process does not require a hearing regarding a convicted sex offender's current dangerousness before the offender can be required to register. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003). The *Doe* Court, however, far from holding that a liberty interest is not implicated where sex offender conditions are imposed

on those *not* convicted of a sex offense, noted that the registration law applied only to those with sex offense convictions. *See id.* at 7, 123 S.Ct. 1160 ("[T]he law's requirements turn on an offender's conviction alone--a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest."), and at 9 (Scalia, J., concurring) (noting that "a *convicted* sex offender has no [ ] right to *additional* 'process' enabling him to establish that he is not dangerous") (emphasis added). Because the present case deals with a petitioner who never had the original "procedurally safeguarded opportunity to contest," we do not believe *Doe* provides much guidance.

III. *Substantive Due Process*

Coleman also contends that Texas's imposition of sex offender registration and therapy absent a sex offense conviction constitutes arbitrary state action that "shocks the conscience" and thus violates his substantive due process rights. [FN31] Coleman refers this court to the sex offender treatment outlined in the Council for Sex Offender Treatment's website. [FN32] As described on the website, "[s]ex offender treatment is different than traditional psychotherapy in that treatment is mandated, confrontational, structured, victim centered, focused on behaviors, and confidentiality is not maintained." Treatment can include "interventions with psychopharmacological agents," polygraph exams to determine sexual history, and use of penile plethysmographs to "modify deviant sexual arousal and enhance appropriate sexual arousal." [FN33]

FN31. *See Rochin v. California*, 342 U.S. 165, 172-73, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

FN32. COUNCIL ON SEX OFFENDER TREATMENT INFORMATION ON THE TREATMENT OF SEX OFFENDERS,

http://www.tdh.state.tx.us/hcqs/plc/csottreatment.htm #information (last updated Oct. 25, 2004); *see supra* note 28.

FN33. In *Harrington v. Almy*, the First Circuit reversed summary judgment against a state employee alleging a substantive due process violation based on his employer's requirement that he undergo treatment with a plethysmograph to retain his job. 977 F.2d 37. The court stated that "[a] reasonable finder of fact could conclude that requiring the plethysmograph involves a substantive due process violation. The procedure, from all that appears, is hardly routine. One does not have to cultivate particularly delicate sensibilities to believe [that the process is] degrading.... The procedure involves bodily manipulation of the most intimate sort." *Id.* at 44.

While these therapeutic measures are certainly intrusive, we do not believe that clearly established federal law, as determine by the Supreme Court, requires the conclusion that Texas's sex offender therapy "shocks the conscience." [FN34] In *County of Sacramento v. Lewis*, the Supreme Court reiterated its reluctance to expand the concept of substantive due process. [FN35] While the core of substantive due process is protection from arbitrary government action, "only the most egregious official conduct" is arbitrary in the constitutional sense. [FN36] The Court noted that behavior most likely to "shock the conscience" and thus support a substantive due process claim is "conduct intended to injure in some way unjustifiable by any *225 government interest." [FN37] In the present case, sex offender treatment serves the government interest in protecting members of the community from future sex offenses. [FN38] In addition, as invasive as the therapy appears, we doubt that the parole panel imposed the therapy condition with the intent to injure Coleman.

FN34. *Berthiaume v. Caron*, 142 F.3d 12, 17 (1st Cir.1998) (noting that the plethysmograph is widely used in the scientific community to treat pedophelia and rejecting plaintiff's substantive due process challenge to a professional regulatory board's requirement that plaintiff submit to a plethysmograph where the board had "good reason" to suspect that plaintiff was a pedophile).

FN35. 523 U.S. 833, 842, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

FN36. *Id.* at 846, 118 S.Ct. 1708.

FN37. *Id.* at 849, 118 S.Ct. 1708.

FN38. *McKune v. Lile*, 536 U.S. 24, 33, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002) ("Therapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism.").

IV. *Conclusion*

The Texas Department of Criminal Justice is authorized by Texas law to impose reasonable conditions on parole to serve the interests of protecting the community and rehabilitating the parolee. [FN39] When those conditions impact a liberty interest of the parolee, they may be imposed only with justification. The Department may condition Coleman's parole on sex offender registration and therapy only if he is determined to constitute a threat to society by reason of his lack of sexual control. Absent a conviction of a sex offense, the Department must afford him an appropriate hearing and find that he possesses this offensive characteristic before imposing such conditions. This court was told at oral argument that evidence of Coleman's lack of sexual control

exists. None appears in the record, however, and no contention is made that Coleman has been afforded a hearing meeting the requirements of due process.

> FN39. Tex. Gov't Code § 508.221 (Vernon 2004); Tex.Code Crim. Proc. art. 42.12 § 11(a) (Vernon Supp.2004-2005).

We therefore hold that the sex offender conditions placed on Coleman's parole are invalid, and we remand the cause to the district court for disposition consistent with this opinion. The state is not precluded from further efforts to add these same conditions to Coleman's parole upon proper notice and consistent with this opinion.

Reversed and remanded.

395 F.3d 216

END OF DOCUMENT

United States Court of Appeals,
Fifth Circuit.
Tony Ray COLEMAN, Petitioner-Appellant,
v.
Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellee.
No. 03-50743.

May 13, 2005.

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Ana Jordan (argued), Austin, TX, for Dretke.

Appeal from the United States District Court for the Western District of Texas.

ON PETITION FOR REHEARING EN BANC

Before REAVLEY, BENAVIDES and PRADO, Circuit Judges.

PER CURIAM:

Because less than a majority of judges in active service have voted in favor of granting the petition for en banc rehearing, the petition is denied. To avoid confusion about our decision, we think it necessary that we write further to correct the mistakes of the accompanying dissent on the record and the law.

I. *The Record*

Tony Ray Coleman has never been convicted of a sex offense or otherwise found to be a sex offender. He did not "stipulate" to sex offender conditions upon his release on January 17, 2001, as the dissent states. The parole board imposed those conditions a month after he had been released without allowing Coleman any opportunity to object. The conditions took effect by action of the

parole board and Coleman was then required to acknowledge their imposition. The dissent repeats a new and unexplained assertion from the state's petition for rehearing that the requirement for registration as a sex offender has been dropped. Coleman was required by the board and his parole officer to register as a sex offender, and did register with the Austin police. Coleman remains imprisoned because he failed to submit to sex offender therapy.

***667** The dissent states that we do not challenge the conduct alleged in Coleman's sexual assault indictment. As the state has never established the truth of those allegations in a criminal trial or other proceeding, we have no basis for assessing their veracity, and to assume them to be either true or false would be improper.

The dissent maintains that it was "pure conjecture" for the panel to rely on the website of the Texas Council on Sex Offender Treatment to determine that the state's sex offender treatment is behavior modifying. Coleman cited to and relied on the same website in his brief and no contradiction was made by the state to that or to Coleman's characterization of sex offender therapy, either in its appellate brief or at oral argument. The attempt to object for the first time on petition for rehearing comes late. *See Arenson v. S. Univ. Law Ctr.*, 53 F.3d 80, 81 (5th Cir.1995). Furthermore, we fail to see any merit to an objection to the panel taking judicial notice of the state agency's own website. As the panel explained, the Texas Council is charged by statute with developing strategies and standards for the treatment of sex offenders in Texas. Tex. Occ.Code § 110.151 (Vernon 2004). There is no support in this record for the assertion in the state's petition for rehearing that the treatment on which Coleman's release was conditioned is anything other than the intrusive and behavior-modifying treatment outlined on the website.

The panel relied on the invasive and behavior-modifying nature of sex offender therapy. We said that, "due to its highly invasive

nature, Texas's sex offender therapy program is qualitatively different from other conditions which may attend an inmate's release." *Coleman v. Dretke*, 395 F.3d 216, 223 (5th Cir.2004). The dissent erroneously states that we have required pre-deprivation process whether or not invasive physical treatment is contemplated.

The dissent erroneously treats Coleman's case as a mere challenge to the nature of his confinement rather than a claim for release, as if mandatory supervision is a level of control different from parole. Under Texas law, mandatory supervision is statutorily mandated when the inmate has accrued a certain level of good conduct time, and the parole board has less discretion in denying an inmate's release on mandatory supervision than on parole. Tex. Gov't Code §§ 508.001(5), 508.001(6), 508.141, 508.147(a) (Vernon 2004); *Ex parte Retzlaff*, 135 S.W.3d 45, 48-49 (Tex.Crim.App.2004). The condition that Coleman reside in a halfway house until employed is also immaterial. The condition, like all conditions of release, is a constraint on the freedom of the releasee, but it does not alter the "quantum change in the level of custody" that occurs when an individual is allowed to live outside prison walls, whether on parole or mandatory supervision. *See Wilkinson v. Dotson*, --- U.S. ----, 125 S.Ct. 1242, 1250, 161 L.Ed.2d 253 (2005) (Scalia, J., concurring).

II. *The Law*

The dissent argues that the panel mis-applied and extended *Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980). And it argues that the panel failed to adhere to the deferential standard of review applicable to state habeas proceedings under the Anti-terrorism and Effective Death Penalty Act (AEDPA).

According to the dissent, Coleman failed to show that his situation is in line with the material facts of *Vitek* by establishing that the conditions placed on his release on mandatory supervision caused stigma and involved intrusive behavior-modification treatment. We

have answered that contention above. The new argument that registration has been *668 dropped from the case does not change matters. *Vitek* does not require publication to establish stigma. In fact, the plaintiff in *Vitek* had not been required to register the fact of his classification as mentally ill, and the Court nowhere indicated that his treatment providers would not keep his records confidential. *See Vitek*, 445 U.S. at 483-86 & 492, 100 S.Ct. 1254. The Court nevertheless found it "indisputable" that commitment to the mental hospital alone could cause "adverse social consequences to the individual" and stated that "[w]hether we label this phenomena 'stigma' or choose to call it something else[,] we recognize that it can occur and that it can have a very significant impact on the individual." *Id.* at 492, 100 S.Ct. 1254 (internal quotation marks omitted). Whether or not Coleman must now list his name on an official roster, by requiring him to attend sex offender therapy, the state labeled him a sex offender--a label which strongly implies that Coleman has been convicted of a sex offense and which can undoubtedly cause "adverse social consequences." *See id.; Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir.1997) ("We can hardly conceive of a state's action bearing more 'stigmatizing consequences' than the labeling of a prison inmate as a sex offender."); *Vander Zee v. Reno*, 73 F.3d 1365, 1369 (5th Cir.1996) (stating that a statement causes stigma if it is both false and implies that the plaintiff is guilty of serious wrongdoing). The stigma aspect of the case is thus not mooted by the state's decision to remove Coleman from its sex offender registry. The facts of the present case are in line with *Vitek*'s stigma element.

As explained above, the state's imposition of sex offender status and therapy as conditions of Coleman's release fits squarely within the material facts of *Vitek*, and the panel's decision was thus a proper exercise of deference under AEDPA. The dissent claims that application of *Vitek* to sex offender conditions cannot be clearly established under AEDPA because courts have found that the law

in this area is not clearly established for purposes of qualified immunity. To support this argument, the dissent states that the AEDPA standard and the qualified immunity standard are logically similar. The dissent's reliance on qualified immunity analysis is misplaced. Habeas law and the law of qualified immunity are "doctrinally distinct." *Williams v. Taylor*, 529 U.S. 362, 380 n. 12, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (Stevens, J.). For qualified immunity purposes, law is clearly established if it would be clear to a reasonable official that her conduct was unlawful in the situation she confronted. *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). For AEDPA purposes, clearly established federal law is "whatever would qualify as an old rule under our *Teague* jurisprudence," as long as the old rule was decided by the Court. *Williams*, 529 U.S. at 412, 120 S.Ct. 1495. Under *Teague*, a new rule is one that "breaks new ground or imposes a new obligation on the States or the Federal Government" or that is "not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (emphasis in original). The two standards thus require distinct analyses and cannot be conflated merely because they employ common terminology. *Williams*, 529 U.S. at 380 n. 12, 120 S.Ct. 1495 (Stevens, J.) ("We are not persuaded by the argument that because Congress used the words 'clearly established law' and not 'new rule,' it meant in [28 U.S.C. § 2254(d)(1)] to codify an aspect of the doctrine of executive qualified immunity rather than *Teague*'s retroactivity bar .... Congress had *Teague*--and not any *unrelated* area of our jurisprudence-- specifically *669 in mind in amending the habeas statute .... We will not assume that in a single subsection of an amendment entirely devoted to the law of habeas corpus, Congress made the anomalous choice of reaching into the doctrinally distinct law of qualified immunity[.]") (emphasis added). *Vitek* imposed an obligation on the states to provide process before imposing stigmatizing classifications and concomitant behavior modification

therapy on individuals in their custody. The panel opinion does nothing more.

The dissent implies that the Supreme Court's decision in *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003), illustrates the Court's unwillingness to afford due process protection to "sex offenders"--a term the dissent appears to define as anyone who has been charged with a sex offense, even if never convicted on that charge. As the panel opinion noted, *Doe* is distinguishable. *Coleman*, 395 F.3d at 223 n. 30. First, the *Doe* plaintiff challenged sex offender registration alone-- the case did not involve behavior modification therapy, and thus fell outside *Vitek*'s holding. Second, the plaintiff sought a hearing to determine his current dangerousness and not his status as a sex offender--he had been convicted of an offense enumerated in the registration statute. Because application of the registration statute turned on conviction rather than current dangerousness, the Court found that the plaintiff was not entitled to the hearing he sought regardless of whether the statute deprived him of a liberty interest; whether or not the plaintiff was currently dangerous was immaterial under the statutory scheme. *Doe*, 538 U.S. at 7, 123 S.Ct. 1160. The Court emphasized that the plaintiff in *Doe* had been convicted of an enumerated offense, and thus "ha[d] already had a procedurally protected opportunity to contest." *Id.; see also Gwinn v. Awmiller*, 354 F.3d 1211, 1223-24 & n. 6 (10th Cir.2004) (holding that summary judgment was inappropriate on a procedural due process claim brought by an individual never convicted of a sex offense based on the state's requirement that he register as a sex offender upon release from prison, and stating that "*Doe* ... does not foreclose this due process claim" because the plaintiff, unlike the plaintiff in *Doe*, had not been convicted of a sex offense and alleged that he had had no other procedure through which to contest). In the present case, we have a petitioner who has never been convicted of an offense enumerated in Texas's

registration statute who challenges not only the state's imposition of sex offender status on him but also its requirement that he undergo invasive behavior-modification therapy. On those facts, *Vitek*, and not *Doe*, is the relevant Supreme Court authority.

Finally, the dissent suggests that Coleman was required to bring his case under 42 U.S.C. § 1983 as a challenge to his conditions of confinement rather than as a habeas claim seeking his release. In so arguing, the dissent implies that release from prison to mandatory supervision--the remedy Coleman seeks--is merely a change in the condition of Coleman's confinement rather than a release from custody for habeas purposes. We have answered that above, but it is well established that release from physical confinement in prison constitutes release from custody for habeas purposes, even though the state retains a level of control over the releasee. *Preiser v. Rodriguez*, 411 U.S. 475, 487-88, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) (stating that suits attacking the duration of physical confinement are within the core of habeas corpus); *see Malchi v. Thaler*, 211 F.3d 953, 957- 58 (5th Cir.2000) (holding, in a habeas case, that Texas's pre-1996 mandatory supervision scheme created a constitutional expectancy in early release, but denying relief *670 where the connection between the alleged injury and the timing of petitioner's release was too speculative); *Retzlaff*, 135 S.W.3d at 48-49 (holding, in a habeas case, that Texas's post-1996 mandatory supervision scheme creates a liberty interest in early release).

Even if Coleman's challenge could be viewed as a condition of confinement case, the dissent's argument that he must sue under § 1983 is premised on the notion that § 1983 is the exclusive avenue by which to attack conditions of confinement. While the Supreme Court has held that certain claims must be brought under the habeas statute rather than § 1983, neither the Supreme Court nor this court has held that certain claims must be brought under § 1983 rather than habeas. *Docken v. Chase*, 393 F.3d 1024, 1030 n. 6 (9th

Cir.2004); *see Preiser*, 411 U.S. at 499, 93 S.Ct. 1827. In *Preiser*, the Court held that habeas is exclusive of § 1983 in certain situations because the habeas statute is more specific than § 1983. *Preiser*, 411 U.S. at 489-90, 93 S.Ct. 1827. *Preiser*'s rationale does not support the proposition that the more general § 1983 should be exclusive of the more specific habeas in some situations. *See Preiser*, 411 U.S. at 504, 93 S.Ct. 1827 (Brennan, J., dissenting) ("[E]ven under the [majority]'s approach, there are undoubtedly some instances where a prisoner has the option of proceeding either by petition for habeas corpus or by suit under § 1983.").

III. *Conclusion*

For the reasons given in the panel decision, *Coleman v. Dretke*, 395 F.3d 216 (5th Cir.2004), and because the sexual offender conditions of Coleman's mandatory supervision impacted his liberty interest and were imposed without due process, the revocation of his release on mandatory supervision is set aside.

The petition for rehearing is denied. The mandate shall issue instanter, remanding to the district court with instructions to issue the writ to order Coleman's release under its original terms unless the state promptly conducts further proceedings justifying Coleman's confinement pursuant to state law and consistent with the opinion of this court.

EDITH H. JONES, Circuit Judge, with whom E. GRADY JOLLY, JERRY E. SMITH, RHESA HAWKINS BARKSDALE, EMILIO M. GARZA, HAROLD R. DeMOSS, Jr. and EDITH BROWN CLEMENT, Circuit Judges, join, dissenting from the denial of rehearing en banc:

Because this habeas decision threatens serious interference with Texas's treatment of sex offenders, and potentially of other parolees who are now required to undergo treatment or counseling, the case should have been reheard en banc. On the record he advanced,

Coleman should not receive habeas relief entitling him to a hearing before he undergoes mandatory sex offender counseling.

The panel seriously erred on two fronts. First, it has extended liberty interest protection to Coleman and other sex offenders without Supreme Court imprimatur. *Compare Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 8, 123 S.Ct. 1160, 1165, 155 L.Ed.2d 98 (2003) (explicitly refusing to decide whether sex a offender registration law violates a registrant's liberty interest). Second, although couched as holding that the state courts' ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), the panel decision misapplied AEDPA and *Teague v. Lane* [FN1] by making a new rule of law in a habeas case.

FN1. 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 1989).

*671 In a novel substantive holding for this circuit, the panel concluded that Texas violated Coleman's procedural due process rights when it imposed sex offender registration and therapy requirements without giving him advance notice and the opportunity for a hearing on that specific issue. [FN2] The panel cites numerous Supreme Court cases, but none is controlling. The panel relies most heavily on *Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980), in which the Court held that a prisoner has a constitutionally protected liberty interest in not being subjected, without pre-deprivation process, to an involuntary mental health commitment, if it entails both significant social stigma and mandatory behavior modification programs. *Id.* at 492-94, 100 S.Ct. at 1263-64. The Court noted, however, that "*Many ... restrictions* ... [at the mental hospital] might not constitute the deprivation of a liberty interest retained by a prisoner." *Id.* at 494,

100 S.Ct. at 1264. The Court's decision was limited to treatment of the mentally ill and had to and did turn on stigmatizing consequences and mandatory behavior modification treatment. *Id.*

> FN2. While on parole for burglary, Coleman was indicted for aggravated sexual assault of a child and indecency with a child by contact; specifically, for sexually assaulting a twelve-year-old, mentally retarded girl. R. 282. Although the panel now attempts to question this reading of the record in its rehearing order, the panel does not challenge Coleman's precipitating conduct. He pleaded guilty to and was convicted of only misdemeanor assault. In exchange for this guilty plea, the state dropped most of the charges in the initial indictment; however, the first paragraph of the indictment was *not* dropped. R. 76 (waiving only "Count II and all habitual paragraphs and Count I Paragraph II"). The preserved paragraph reads, in pertinent part, "Tony Coleman ... did then and there knowingly and intentionally cause the penetration of the female sexual organ of ..., a child younger than 14 years of age and not his spouse, by his penis." R. 72.
>
> When Coleman was moved to a halfway house, on supervised "release," the state conditioned his transfer, inter alia, on Coleman's registering as a sex offender and receiving therapy. The panel correctly dismissed Coleman's substantive due process claim founded on the state's sex offender program.

Even if it is logical to make the constitutional leap from treatment of the mentally ill, who are helpless as to their condition and its consequences, to sex offenders, who are predators, the twin factual constraints of *Vitek*-- stigmatizing consequences and mandatory behavior modification--are lacking in this case. With due respect, the panel misstated that Coleman must register as a sex offender;

the state dropped this requirement at Coleman's request, and his name does not appear on the list (*see generally* Texas Department of Public Safety Crime Records Service, Sex Offender Database, https:// records.txdps.state.tx.us/soSearch/default.cfm (last visited Apr. 28, 2005)). [FN3] Further, the panel overlooked that the state expressly protects the confidentiality of sex therapy records. *See* Tex. Occ.Code §§ 109.051-109.053. Coleman cannot argue "stigma" on this record. [FN4]

> FN3. In its rehearing order, the panel finds it irrelevant that the registration requirement was dropped. Surely the panel cannot ignore the jurisdictional requirement that a live controversy exist at *all* stages of the litigation. *See, e.g., United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 396-97, 100 S.Ct. 1202, 1208-09, 63 L.Ed.2d 479 (1980); *North Carolina v. Rice,* 404 U.S. 244, 246, 92 S.Ct. 402, 404 (1971) ("Even in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction.").
>
> FN4. To be sure, Coleman would have to demonstrate that the requirements stigmatized him beyond his status as a felony convict and as someone convicted of misdemeanor sexual assault of a twelve-year-old, mentally retarded girl. *See supra* n. 2.

***672** Equally troubling, the panel relied on "facts" outside those provided the state courts in asserting that Coleman would suffer invasive physical procedures. The only basis for this part of the panel opinion is its judicial notice of a state government website. The website discusses the use of "multifaceted" sex offender treatment regimes, which may or may not include the more invasive techniques the panel asserted as demonstrated fact. None of this discussion is probative as to Coleman, who never attended any therapy sessions, never experienced any invasive treatments, and

did not and could not submit any evidence in state or federal court about the therapy sessions he would have been expected to attend. [FN5] The panel's conclusions about what his particular therapy regime would entail are pure conjecture. Thus, the second factual requirement of *Vitek* is absent from this record.

> FN5. Coleman never presented these "facts" to the state courts or requested judicial notice be taken of the website in state court. Although the panel is quick to invoke circuit rules to preclude the state from contesting this "fact" in its petition for rehearing, the state had no notice that the website would be cited by the panel. After all, the "facts" for habeas cases are required to be developed in the state courts. *See* 28 U.S.C. § 2254(d)(2) (referring to "facts in light of the evidence presented in the state court proceedings"); § 2254(e)(i) (applicant can rebut presumption of correctness of state fact findings by clear and convincing evidence); § 2254(e)(2) (no new hearing allowed to develop facts unless the factual predicate "could not have been discovered through the exercise of due diligence"). Moreover, the state now claims (correctly) that Coleman is not in the sex offender database; as shown *supra,* brief consultation (equally worthy of judicial notice) of another website verifies this proposition, which supports the state's claim of a *jurisdictional* defect (*see supra* note 3).

To achieve its desired legal result, the panel extended *Vitek* from the circumstance of inmates' forced mental health treatment to that of forced sex offender registration and therapy. Moreover, the panel further extends the liberty interest created in *Vitek* from a "stigma-plus" due process decision to something approximating a per se procedural due process rule when, as here, registration was not even required, and invasive physical treatment is mere conjecture. That is, the state is required by this decision to grant pre-deprivation process *whether or not* the prisoner's sex therapy

will be publicized and thus stigmatizing, and *whether or not* invasive physical treatment of a particular prisoner is actually contemplated. By transforming the *Paul v. Davis* [FN6] "stigma-plus" test into "plus-stigma," *see Panel Op. on Reh'g*, the panel's conception of a "liberty interest" stands current Supreme Court caselaw on its head. It bears repeating that only two years ago the Supreme Court expressly refused to decide whether a sex offender registration law violates a liberty interest. *Doe*, 538 U.S. at 8, 123 S.Ct. at 1165. [FN7]

> FN6. 424 U.S. 693, 701, 96 S.Ct. 1155, 1160-61, 47 L.Ed.2d 405 (1976) (damage to reputation alone insufficient to invoke procedural due process; loss of reputation must be coupled with some other tangible element to become protectable property interest).
>
> FN7. Moreover, one district court has found that there is nothing atypical or significantly harsh about a prisoner's enduring sex therapy. (These are terms employed by the Supreme Court to explain more clearly the circumstances in which prison conditions could sustain liberty interest analysis. *Sandin v. Conner*, 515 U.S. 472, 484, 115 S.Ct. 2293, 2300, 132 L.Ed.2d 418 (1995).) *See Jones v. Puckett*, 160 F.Supp.2d 1016, 1023 (W.D.Wis.2001) ("Attending sex offender therapy is not atypical and significant compared to ordinary prison life. Prisoners are often required to participate in all types of counseling, not all of which is necessitated by their specific conviction.").

Vitek, moreover, ordered a predeprivation hearing to ascertain the prisoner's *673 mental state before the prisoner may be forcibly institutionalized (with concomitant stigma and invasive treatment). If the panel means to say that Coleman was entitled to initial release to mandatory supervision only after having a hearing concerning the imposition of sex offender conditions, then the facts do not support

the panel's ruling. Coleman *stipulated* to those conditions at the outset of supervised release. *See* R. 91 ("I, Tony Coleman, acknowledge notification of Sex Offender Program Special Condition and the above components. Failure to abide by the above special condition and the initialed components is a violation of my conditions of release. I further understand that even if I refuse to sign the form special condition 'X' and the components that apply are still in effect." (signed by Coleman, 4/3/01)); R. 222 (additional signature of Coleman agreeing to sex offender conditions, dated Mar. 23, 2001). He did not make a due process challenge at that time. Having so stipulated in order to gain "release," Coleman is in an odd position now, four years later, when he backs off his agreement.

In these various ways, the panel relied on unproven facts and distortion of *Vitek* to reach its substantive conclusion. Its methodology also plays havoc with Congress's carefully crafted limitations on federal habeas review. AEDPA authorizes federal courts to overturn only those state court decisions that represent an "unreasonable" application of constitutional law decided by the Supreme Court. An "unreasonable" decision must be not just wrong, but really wrong. *See Brown v. Payton*, --- U.S. ----, 125 S.Ct. 1432, 1442, 161 L.Ed.2d 334 (2005); *Williams v. Taylor*, 529 U.S. 362, 410-11, 120 S.Ct. 1495, 1522, 146 L.Ed.2d 389 (2000). This panel's decision cannot even be squared with the actions of the circuits supporting its constitutional adjudication. In *Neal v. Shimoda*, a § 1983 case cited favorably by the panel, the Ninth Circuit found that the liberty interest protected by the due process clause was implicated in a similar factual situation. 131 F.3d 818 (9th Cir.1997). The court went on, however, to sustain the qualified immunity of individual defendants. The qualified immunity ruling is wholly at odds with what the panel *had* to find in order for Coleman to prevail under AEDPA. *Neal* stated:

> *No reasonable prison official would have reason to know that* the classification of Neal as a sex offender or the requirement that Neal complete the [treatment] as a precondition to parole eligibility *would implicate a protected liberty interest, let alone that the program violated his due process rights.*

Id. at 832 (emphasis added); *see also Chambers v. Colorado Dep't of Corr.*, 205 F.3d 1237, 1244 (10th Cir.2000) (holding, on similar facts, that "[b]ecause the state of the law was not established when these actions were taken, the prison officials named in this lawsuit are entitled to qualified immunity"). [FN8] While the AEDPA/*674 *Teague* standard and the test for qualified immunity are "doctrinally distinct," *Williams*, 529 U.S. at 380, 120 S.Ct. at 1506 n. 12 (Stevens, J.) (plurality opinion), we need not ignore their logical similarity. It is *il*logical to conclude that no "new rule" is made here when the panel (a) orders Texas prison officials, for the first time, to give hearings to sex offenders who were not explicitly convicted of sex offenses; (b) determines such prisoners are now entitled to hearings even if their sex offender treatment is fully confidential and amounts to "talk therapy"; and (c) the other circuits have agreed, through their qualified immunity conclusions, that *Vitek* supports but does not necessarily compel similar results.

> FN8. The other circuits' § 1983 decisions also raise a serious question whether the panel properly decided this as a habeas case. On January 17, 2001, Coleman was released on mandatory supervision on the condition that he reside in a halfway house until reemployed. "Mandatory supervision" is "the release of an eligible inmate so that the inmate may serve the remainder of the inmate's sentence *not on parole* but under the supervision of the pardons and paroles division." Tex. Gov't Code § 508.001(5) (Vernon 2004) (emphasis added) (quoted in *Panel Op.*, --- F.3d ----, ---- (slip op. at 2 n.1)). The appropriate avenue for challenging the state's treatment of Coleman appears to be

through 42 U.S.C. § 1983, not habeas. *See Wilkinson v. Dotson,* --- U.S. ----, 125 S.Ct. 1242, 1250, 161 L.Ed.2d 253 (2005) (Scalia, J., concurring) ("It is one thing to say that permissible habeas relief, as our cases interpret the statute, includes ordering a 'quantum change in the level of custody,' such as release from incarceration to parole. It is quite another to say that the habeas statute authorizes federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody .... A holding that this sort of judicial immersion in the administration of discretionary parole lies at the 'core of habeas' would utterly sever the writ from its common law roots."); *Cook v. Tex. Dep't of Criminal Justice Transitional Planning Dep't,* 37 F.3d 166, 168 (5th Cir.1994) (habeas corpus is solely available to challenge the "fact or duration of confinement"); *Bunn v. Conley,* 309 F.3d 1002, 1008 (7th Cir.2002) (rejecting an attempt to challenge in habeas a "crime of violence" notification requirement imposed as part of supervised release because the requirement "in no way affects the duration, much less the fact, of confinement"). Notably, four other circuits have addressed issues similar to those posed to this panel in § 1983; none has considered the issue through habeas. *See Gunderson v. Hvass,* 339 F.3d 639, 642 (8th Cir.2003); *Chambers v. Colorado Dep't of Corr.,* 205 F.3d 1237, 1239-40 (10th Cir.2000); *Kirby v. Siegelman,* 195 F.3d 1285, 1287 (11th Cir.1999); *Neal v. Shimoda,* 131 F.3d 818, 824 (9th Cir.1997).

In sum, the panel's "new rule" was not "dictated by Supreme Court precedent." *See Teague,* 489 U.S. at 301, 109 S.Ct. at 1070 (a "new rule" is one that "breaks new ground or imposes a new obligation on the States ...."). It would be hard for any prisoner procedural due process innovation to be dictated by precedent given the inherent

balancing involved in due process cases. That the panel's decision was not "dictated" by *Vitek*, however, is ultimately reinforced by the Supreme Court's refusal, in *Doe, supra*, to decide whether a liberty interest exists in not being classified as a sex offender.

As a way around its inability to cite "clearly established" Supreme Court caselaw, the panel invokes *Yarborough v. Alvarado*, 541 U.S. 652, 124 S.Ct. 2140, 2151, 158 L.Ed.2d 938 (2004) ("Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt."). *See Panel Op.* --- F.3d at ---- (slip op. at 11 n.30). *Yarborough* is not on point. Moreover, the Court's dicta were immediately followed by the statement, "This is not such a case, however." *Id.* Further, Justice Kennedy cited no illustrative caselaw after making this broad statement. *Yarborough*'s dicta do not eliminate the longstanding rule that habeas is not the avenue through which a federal court may find new constitutional rights. *See Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *Williams*, 529 U.S. at 379, 120 S.Ct. at 1505-06 (noting that *Teague* "remains the law" even after AEDPA, and that "[i]t is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final").

The only thing more perplexing than the panel's determination on the merits is what happens next--both for Coleman and the state correctional institutions in this circuit. The panel decision is neither fish nor fowl: Coleman "wins" and the district *675 court is reversed, yet Coleman does not secure his release, and the panel does not offer any guidance to the district court as to the appropriate next step. This is without precedent. Should the district court hold a mini-trial? Or should the district court order Coleman "released" back into the halfway house, where he is still in custody under Texas law, until the state convenes yet another hearing and affords

Coleman an opportunity to dispute his status and treatment regimen? *Compare Vitek*, 445 U.S. at 494-96, 100 S.Ct. at 1264-65 (refusing to require states to provide counsel for predeprivation hearings). And what should prison officials do when they want a parolee to obtain counseling for drug abuse, alcoholism, or even depression? Surely stigma may attach to any of these labels, even, apparently, if the treatment is confidential. Must procedural process be afforded?

This opinion extends *Vitek* beyond recognition and vastly complicates the state's attempts to rehabilitate troubled, as well as predatory, inmates. Equally unfortunate, it does violence to the deference that we owe state courts under AEDPA. The panel crafted a "new rule" of parole procedure where two other circuits, on whose opinions it heavily relied, granted § 1983 qualified immunity *precisely* because the law on this issue--the pre-parole process owed a sex offender--is not clear, much less "dictated by precedent." This opinion opens the door to other judge-made "new rules" that undermine AEDPA's statutory requirements.

I respectfully dissent.

409 F.3d 665

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TONY RAY COLEMAN	§	
	§	
VS.	§	CIVIL NO. A-02-CA-578 JN
	§	
JANIE COCKRELL	§	

ORDER

Before the Court is the above-entitled cause of action. This cause was referred to the United States Magistrate Judge for findings and recommendations pursuant to 28 U.S.C. § 636(b) and Rule 1 of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. The Magistrate Judge filed his Report and Recommendation (Clerk's Doc. No. 19) on May 30, 2003. Respondent filed her Objections (Clerk's Doc. No. 20) on June 2,2003. Based on these documents, the applicable legal authority and the entire case file, the Court enters the following Order.

In light of the Objections, the Court has undertaken *a de novo* review of the entire case file in this cause and finds that the Recommendation filed by the Magistrate Judge is correct and should be approved and accepted by the Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the United States Magistrate Judge's Report and Recommendation filed in this cause is APPROVED and ACCEPTED by this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Petitioner's application for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is DENIED.

IT IS FURTHER ORDERED that this case is CLOSED and any pending motions are DENIED AS MOOT.

SIGNED AND ENTERED this 4th day of June, 2003.

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

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BY: /s/
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TONY RAY COLEMAN	§	
	§	
VS.	§	CIVIL NO. A-02-CA-578 JN
	§	
JANIE COCKRELL	§	

FINAL JUDGMENT

Before the Court is the above entitled cause of action. Based on the Court's previous Order entered on this date, the Court enters the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED, ADJUDGED AND DECREED that this case is CLOSED and all pending motions are DENIED AS MOOT.

SIGNED AND ENTERED this /s/ 4th day of June, 2003

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TONY RAY COLEMAN,	§	
Petitioner	§	
	§	
V.	§	**A-02-CA-578-JN**
	§	
JANIE COCKRELL, Director,	§	
Texas Dept. of Criminal	§	
Justice-Institutional Division,	§	
Respondent	§	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

To: The Honorable James R. Nowlin, Chief United States District Judge

The Magistrate Judge submits this Report and Recommendation to the District Court pursuant to 28 U.S.C. §636(b) and Rule 1(d) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrates, as amended, effective January 1, 1994.

Before the Court are Petitioner's Application for Habeas Corpus under 28 U.S.C § 2254 (Document 1); Respondent's Answer (Document 8); Petitioner's response thereto (Document 9); Respondent's Supplemental Answer (Document 16); Petitioner's response thereto (Document 17) and Respondent's Advisory to the Court (Document 18). Petitioner, proceeding pro se, has been grated leave to proceed in forma pauperis. For the reasons set forth below, the undersigned finds that Petitioner's application for writ of habeas corpus should be denied.

STATEMENT OF THE CASE

A. Petitioner's Criminal History

According to Respondent, the Director has lawful and valid custody of Petitioner pursuant to a judgment and sentence of the 147th Judicial District Court of Travis County, Texas, in cause number 80,100, styled the State of Texas v. Tony Ray Coleman. Petitioner was charged with the felony offense of burglary of habitation, enhanced as a habitual offender. He entered a plea of not guilty and was tried by a jury, which on February 11, 1986, found him guilty. The court assessed punishment of imprisonment for thirty years. Petitioner was released on a mandatory supervision on January 17, 2001. However, his mandatory supervision was revoked on July 9, 2001. In his habeas application Petitioner is not challenging his underlying conviction. Instead, he is challenging the revocation of his mandatory supervision. Petitioner also challenged the revocation of his mandatory supervision in a state application for habeas corpus relief. The Texas Court of Criminal Appeals denied his application without written order. Ex parte Coleman, Appl. No. 42,281-01.

B. Petitioner's Grounds for Relief

Petitioner raises the following grounds for relief:

1. He was denied a hearing to challenge his sex offender status;

2. He was illegally classified as a sex offender and forced to participate in sex offender therapy;

3. His classification as a sex offender violates the prohibitions against ex post facto laws; and

4. His parole hearing was illegal.

C. Exhaustion of State Court Remedies

Respondent contends Petitioner has exhausted his state court remedies with regard to only one of his claims - the claim that he was illegally classified as a sex offender and forced to participate in sex offender therapy. A review of the state court records submitted by Respondent shows that Petitioner raised only this one issue in his state application for habeas corpus relief. However, he did raise his additional claims in his reply to the State's general denial. Ex parte Coleman, Appl. No. 52,281-01, Supplemental Transcript at 4-21. The reply was filed in April 2002, before the trial court issued its findings of fact, recommendation and order to transmit habeas corpus record. Id. at 2-3. There is nothing in the record to suggest the trial court considered the reply as untimely filed. It does appear, however, that the trial court ignored the reply as the court did not address in its Findings of Fact, Recommendation and Order to Transmit Habeas Corpus Record any of Petitioner's newly raised claims. Out of an abundance of caution the Court considers Petitioner's claims exhausted.

DISCUSSIONS AND ANALYSIS

A. The Antiterrorism and Effective Death Penalty Act of 1996

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 ["AEDPA"],[1] which radically altered the standard of review by this Court in federal habeas corpus proceedings filed by state prisoners pursuant to Title 28 U.S.C. § 2254. Under the AEDPA's new standard of review, this Court cannot grant Petitioner federal habeas corpus relief in this cause in connection with any claim that was adjudicated on the merits in state court proceedings unless the adjudication of that claim either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in the state court proceeding, 28 U.S.C. § 2254(d)(1)-(2).

The "contrary to" requirement" refers to the holdings, as opposed to the dicta, of ... [the Supreme Court's] decisions as of the time of the relevant state-court decision." Dowthitt v. Johnson, 230 F.3d 733, 740 (5th Cir. 2000) (quoting (Terry) Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 1523 (2000)). The inquiry into whether the decision was based on an "unreasonable determination of the facts" constrains a federal court in its habeas review due to the deference it must accord the state court. See id.

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives a

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1. Pub.L.No.104-132,110 Stat.1214 (1996).

> conclusion opposite to that reached by ... [Supreme Court] on a questions of law or if the state court decides a case differently than ... [Supreme Court] has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from ... [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

Id. at 740-41.

Section 2254(d)(2) speaks to factual determinations made by the state courts. See 28 U.S.C. § 2254(e)(1). While we presume such determinations to be correct, the petitioner can rebut this presumption by clear and convincing evidence. See id. Absent an unreasonable determination in light of the record, we will give deference to the state court's fact findings. See id. § 2254(d)(2). With these principles in mind, this Court must now turn to the issues raised by the pleadings in this cause.

B. Classification Issues

Petitioner argues he was illegally classified as a sex offender and forced to participate in sex offender therapy. In addition he argues he was denied a hearing to challenge his classification as a sex offender and his parole hearing was illegal. The Court presumes Petitioner is arguing his parole hearing was illegal because he had been illegally classified as a sex offender.

As explained by Respondent, the parole board had the authority to set conditions of parole or mandatory supervision, including special conditions. TEX. GOV'T CODE § 508.044(b)(2) (West 2002). Specifically, a parole panel may impose as a condition of parole or mandatory supervision any condition that a

court may impose on a defendant placed on community supervision under Article 42.12, Code of Criminal Procedure. TEX. GOV'T CODE § 508.221 (West 2002). Under the Texas Code of Criminal Procedure, the courts can impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant. TEX. CODE CRIM. PROC. Art. 421.12 § 11(a) (West 2002). Moreover, there is nothing new about the authority of the parole board to impose necessary conditions on inmates released to mandatory supervision. The law in effect at the time Petitioner was convicted authorized the parole board to "adopt such other reasonable rules not inconsistent with law as it may deem proper or necessary with respect to the eligibility of prisoners for parole and mandatory supervision, the conduct of parole and mandatory supervision hearings, or conditions to be imposed upon parolees and person released to mandatory supervision." TEX. CODE CRIM. PROC. art. 42.18, § 8 (g) (Vernon 1986) (since repealed).

Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. As demonstrated by the Parole Revocation Packet attached to Respondent's Supplemental Answer [#16], the Parole Board had good reason to impose Petitioner's sex offender status. Accordingly, Petitioner's claim does not warrant federal habeas relief.

C. Ex Post Facto

Petitioner also contends his classification as a sex offender violates the prohibitions against ex post facto laws. The Fifth Circuit recently decided neither sex offender therapy nor registration violate the prohibitions against ex post fact laws because the intent of such laws is not punitive. See Rieck v. Cockrell, 321 F.3d 487, 488 5th Cir. 2003) (sex offender therapy

was not intended to be punitive and serves important nonpunitive goals); Moore v. Avoyelles Correctional Center 253 F.3d 870, 872 (5th Cir. 2001) (sex offender notification laws and not ex post facto). Accordingly, Petitioner's claim has no merit.

RECOMMENDATION

It is recommend that Petitioner's application for writ of habeas corpus be denied.

OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. Battles v. United States Parole Comm'n, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within ten (10) days after the party is served with a copy of the Report shall bar that party from de novo review by the district court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the district court. See 28 U.S.C. § 636(b)(1)(C); Thomas v. Arn, 474 U.S. 140, 150-153, 106 S. Ct. 466, 472-74 (1985); Douglass v. United Servs. Auto Assoc., 79 F.3d 1415 (5th Cir. 1996)(en banc).

The Clerk is directed to send a copy of this Report and Recommendation to the parties by certified mail, return receipt requested.

SIGNED this /s/ 30th day of May 2003.

/s/ Stephen H. Capelle
STEPHEN H. CAPELLE
UNITED STATES MAGISTRATE JUDGE

APPLICANT TONY RAY COLEMAN

APPLICATION NO. 52,281-01

APPLICATION FOR 11.07 WRIT OF HABEAS CORPUS

ACTION TAKEN

APPLICATION DENIED WITHOUT WRITTEN ORDER.

/s/ Barbara P. Hervey 5/29/02

NO. 80100-A

EX PARTE	§	IN THE DISTRICT COURT
	§	
	§	147th JUDICIAL DISTRICT
	§	
TONY RAY COLEMAN	§	TRAVIS COUNTY, TEXAS

FINDINGS OF FACT, RECOMMENDATION, AND ORDER TO TRANSMIT HABEAS CORPUS RECORD (POST CONVICTION APPLICATION)

ON THIS /s/ 6th day of /s/ May 2002, came on to be considered the Application for Writ of Habeas Corpus in the above cause. The Court has considered evidence in the form of testimony, affidavit, judicial notice and/or personal recollection. Having considered said evidence, the court makes the following findings of fact and conclusions of law:

Findings of fact:

a) Applicant was convicted of burglary of a habitation in cause number 80100 in the 147th District Court of Travis County, Texas, and a judgment was entered on February 11, 1986;

b) A reportable conviction for purposes of sex offender registration requirements under Chapter 62 of the Code of Criminal Procedure, Sex Offender Registration Program, includes the offense of burglary;

c) Chapter 62 applies to reportable convictions occurring on or after September 1, 1970; and,

d) Applicant has failed to allege facts that, if true, would entitle him to relief.

Conclusions of law:

Under the terms of Applicant's application, he has committed a reportable offense under Chapter 62.

On the basis of the above findings and conclusions the court recommends that relief be DENIED as to the following:

The court hereby ORDERS that the District Clerk of Travis County prepare and transmit the record herein to the Court of Criminal Appeals.

/s/ Wilford Flowers
JUDGE PRESIDING